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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN C. BIERWIRTH, ROBERT G. FREESE, and CARL A. PALADINO,

Petitioners,

—against—

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 13, 1982

Questions Presented

1. May the trustees of an ERISA pension plan, during a tender offer for control of the employer-sponsor, purchase shares of the employer-sponsor where: (i) the plan is dependent upon the employer-sponsor for future funding; (ii) the trustees comply with the statutory provisions limiting purchases of securities of an employer-sponsor to 10% of the plan's assets; and (iii) the trustees have good reason to believe that the tender offer poses special dangers to the plan and that the shares of the employer-sponsor are a good investment at the price paid?

2. Did the Court of Appeals err in applying the traditional "prudent man" rule in assessing the conduct of the trustees where ERISA and its legislative history make plain that the applicable rule should be one which reflects the "special nature of employee benefit plans"?

Parties Below

The parties to this action in the Court below were:

Plaintiff-Appellee:

Raymond J. Donovan, Secretary of the United States Department of Labor.

Defendants-Appellants:

John C. Bierwirth, Robert G. Freese and Carl A. Paladino (Trustees of the Grumman Corporation Pension Plan).

Intervenors-Appellants:

Joseph W. Ullman, Lillian E. Baldissard, Rita V. Haffner, Anthony Pancella, Jr., Kathleen T. Chew and Benjamin L. Crews (Grumman Employees and Retirees covered by the Plan).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion and order of the United States Court of Appeals for the Second Circuit, reported at 680 F.2d 263 and set forth in the appendix to this petition at (1A), affirmed the grant of a preliminary injunction against the Trustees of the Grumman Corporation Pension Plan (the "Trustees" of the "Plan"), who had, during a tender offer by The LTV Corporation ("LTV") for Grumman shares, decided not to tender Grumman shares previously purchased and to purchase additional shares. The Court reversed the District Court's appointment of an interim receiver to manage the Grumman shares owned by the Pension Plan (680 F.2d at 277; 31A). In an unreported

order filed June 18, 1982 in response to the Trustees' petition for rehearing, the Second Circuit modified some of the language of its opinion but otherwise denied the petition (32A-34A).

The opinion of the District Court is reported at 527 F. Supp. 86 and found in the appendix at (37A). The unreported order of the District Court is found in the appendix at (66A).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 10, 1982 (71A). Petitioner's timely motion for rehearing with a suggestion for rehearing *en banc* was denied on June 18, 1982 (32A-35A). This Court has jurisdiction by reason of 28 U.S.C. § 1254(1) (1976).

Statutory and Regulatory Provisions

Those portions of the statutes and regulations which are relevant to this petition (specifically, section 404 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1104 (1976) and section 407 of ERISA, 29 U.S.C. § 1107 (1976)) appear in the appendix at the end of this petition (1S-2S).

Statement of the Case

The Plan, like other pension plans covering 34 million American workers,[1] is a "defined benefit plan", a creature of statute which, like a common law trust has "trustees" and "beneficiaries" but in important respects (which are at the heart of this case) is radically different. Benefits are established by the employer-sponsor, not the trustees. Any

[1] American Council of Life Insurance, *1981 Pension Facts* 5.

shortfall on investments must be made up by the sponsor; conversely, any windfall, in the form of unanticipated appreciation in plan assets, inures to the benefit of the sponsor, whose required contributions are thereby reduced. In short, the vicissitudes of the plan's investment performance do not affect either the level of benefits granted under the plan or the plan's ultimate security except in the drastic and unusual circumstances of the sponsor's financial failure.

A tender offer for control of the plan's sponsor directly affects the future of the plan and its beneficiaries in a variety of important ways.[2] A one time investment gain, or loss, even a substantial one, may be of little meaning to the participants and beneficiaries in comparison to the range of potential consequences resulting from a change in sponsors. A new sponsor may change to a less conservative funding policy; it may be less generous in establishing and increasing benefits; it may, because of financial weakness, be unable to continue funding at all; and it may, subject to certain ERISA restrictions, terminate the plan or merge it with another plan, to the possible detriment of the plan's participants. The most important requirement for any pension plan is a financially healthy and benevolent sponsor.

The interdependent relationship between a plan and its sponsor motivated Congress (1) to permit officers of the sponsor to serve as trustees, ERISA section 408(c)(3), 29 U.S.C. § 1108(c)(3) (1976); and (2) to permit officer-

[2] A change in the identity of the employer-sponsor of an ERISA pension plan continues to be an increasingly frequent occurrence. Corporate merger activity in the United States increased by 27% in 1981 to 2,395 transactions as compared with 1,889 the prior year. Economics Division, Congressional Research Service, *Merger Tactics and Public Policy*, 97th Cong., 2d Sess. 14 (Comm. Print 1982).

trustees to invest up to 10% of the plan's assets in the securities of the employer-sponsor, ERISA section 407, 29 U.S.C. § 1107 (1976). Congress viewed investments in the sponsor's securities as fostering the "symbiotic relationship existing between the employer and the plan covering his employees", "desirable to the sound, efficient functioning of employee benefit plans" and "likely to be engaged in by fiduciaries of . . . all plans". S. Rep. No. 93-127, 93d Cong., 1st Sess. 31, 33 (1973).

With this background in mind, we turn to the brief period in the fall of 1981 when the Trustees of the Plan were faced with an unexpected tender offer for a controlling interest in the Plan's sponsor by an entity with the dubious distinction of having the tenth largest unfunded pension liability in the nation.[3]

A. *The Tender Offer and The Trustees' Actions*

The facts are simple and largely undisputed. On September 23, 1981, LTV announced its intention to make a tender offer for a controlling interest in Grumman Corporation ("Grumman"), the employer-sponsor of the Plan (370a).[4] The LTV tender offer was structured so as to remain open for the minimum period allowed by law, twenty business days, with the proration/withdrawal period expiring one minute after midnight on October 15 (835a). The Board of Directors of Grumman, after receiving the advice of its investment bankers that the offering price was inadequate and of its lawyers that the offer likely violated both the federal antitrust and securities laws, voted on September 25 to recommend to its shareholders that they

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[3] *Paper Gains in Covering Pension Fund Liabilities*, Business Week, August 9, 1982, at 70.

[4] Citation in the form "(....a)" are to the Joint Appendix in the Court below.

not tender their shares to LTV (372a; 418a). On September 28 Grumman initiated antitrust and securities act litigation against LTV which ultimately resulted in the abandonment of the tender offer.

The Plan had been a shareholder of Grumman for several years owning 525,025 shares (146a), well below the 10% limit of section 407. Since prior to the adoption of ERISA, Grumman officers had served as Trustees of the Plan (226a; 451a). Trustee Paladino was (and is) Chief Financial Officer of Grumman's principal subsidiary (448a) and Trustees Bierwirth and Freese were (and are) directors and respectively Chief Executive Officer and Chief Financial Officer of the parent corporation (414a; 369a-70a). Each of the Trustees had followed, and was familiar with LTV's activities and performance because it had long been, and was, one of Grumman's leading competitors in the aerospace industry (a fact which ultimately led to an antitrust injunction).

Nearly two weeks after the offer was announced and nine days before the proration/withdrawal period was to expire, and while Grumman's preliminary injunction motion against the offer was pending for decision, the Trustees met on the afternoon of October 7 to consider a response to the LTV offer (460a; 422a; 379a). Some decision on their part was required with respect to the 525,025 shares held by the Plan. Prior to the formal meeting, the Trustees had discussed the Plan's response to the LTV offer with one another and had expressed some of their concerns about its impact on the Plan (379a; 421a-29a; 455a-56a). They had also been urged by some of the Plan's beneficiaries to purchase more Grumman shares to impede the offer and protect the Plan.[5]

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[5] On September 30, three hundred members of the Grumman Retirees Club—all beneficiaries of the Plan—met to discuss the

The October 7 meeting commenced with a presentation by the Plan's legal counsel, John Mullan, of the responsibilities of the Trustees as fiduciaries under ERISA (424a; 463a; 388a). He advised them that they were obligated to act prudently and solely in the best interests of the beneficiaries and participants of the Plan (424a; 463a; 388a).

Each of the Trustees expressed somewhat differently his reasons for reaching the same conclusion at the October 7 meeting: that the LTV offer was not in the best interests of the beneficiaries and participants of the Plan. Freese testified that "I personally read everything that I could get my hands on that LTV had out in the public record. I was concerned about the underfunding of their pension plan" (427a). Paladino testified that he "was very much concerned [that LTV] would cease to improve or increase benefits as had been the history of the plan. Concerns were that in light of their own plan where they had some $225 million of [unfunded liabilities]" (463a-64a).

The Trustees were not the only ones who were concerned about LTV's unfunded pension liabilities. Seven days after the Trustees' meeting Judge Mishler was to hold that:

> "[A]ccording to financial statements filed with the SEC (Vol. III, Ex. 32), LTV has unfunded pension liabilities totalling $225,000,000 at December 31, 1980. This sum was not reported in the Offer to Purchase.
>
> "In view of the substantial amount of these liabilities and the important role of financial information in determining what action a shareholder should take in

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LTV offer and Trustee Bierwirth was invited to attend. The suggestion was made by several of the retirees that the Plan should purchase additional shares of Grumman and the group was "very vociferous" in its support of that idea. The retirees voted to spend their own money on advertisements expressing their opposition to the offer.

response to this tender offer, we find that the failure to include these significant liabilities is an omission of material fact." *Grumman Corp.* v. *LTV Corp.*, 527 F.Supp. 86, 103 (E.D.N.Y. 1981).

Freese also testified that "I was concerned about their very highly leveraged debt situation in the company, how that would be increased after the acquisition of Grumman" (427a). LTV had a staggering amount of debt outstanding, which would increase greatly if its acquisition of Grumman were successful. Prior to the tender offer, LTV's current liabilities and long-term debt amounted to $2.4 billion (761a), and LTV had arranged to borrow over $700 million more in connection with the tender offer. There was substantial doubt that, after a successful takeover by LTV, the new management would desire—or be able—to continue the Plan's favorable funding practices.[6] In light of LTV's enormous debt burden, the Trustees believed that there was a substantial risk that LTV might, at minimum, change Grumman's funding policies, resulting in substantially smaller future employer contributions to the trust and reduced security for the Plan participants (381a).

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[6] LTV's May 28, 1981 prospectus confirms the pessimistic view of LTV's financial condition held by the Trustees. Among the many unfavorable items are the following: (i) it had current liabilities of $1.1 billion and long-term debt of $1.3 billion (761a); (ii) it was the subject of eight class actions brought against it and its officers for violation of the federal securities law as a result of their manipulations of inventory and overstatement of income ($26.6 million) over an extended period in the mid-70's (743a-44a); (iii) before the close of 1982, it was required to make expenditures in excess of $200 million—an amount in excess of 150% of its earnings during the last fiscal year—to comply with environmental regulations (747a; 778a); (iv) it was the subject of a $30 million fraud claim brought by the then United States Department of Health, Education and Welfare (754a); and (v) it had unfunded pension liabilities in the amount of $225 million (772a).

Grumman had periodically increased benefits to participants (486a; 385a), something it had no legal obligation to do. The Trustees were also aware that Grumman annually contributed to the Plan the maximum amount that could be deducted under section 404 of the Internal Revenue Code, 26 U.S.C. § 404 (1976), as amended, and the Trustees typically employed prudently conservative actuarial assumptions (58a; 227a) which resulted in higher contributions by Grumman than would have been the case if less responsible assumptions were used. On a termination basis, the Plan's assets would have exceeded the amount necessary to provide all accrued benefits of Plan participants and beneficiaries (58a-59a).

Apart from their concerns about LTV, the Trustees realized that the long-term growth potential of Grumman was excellent. Freese, Grumman's Chief Financial Officer, had recently prepared five-year projections for the corporation (417a), which were discussed by the Trustees at the October 7 meeting (426a). The new Reagan budget, according to Freese, was going to have a dramatic positive effect upon Grumman's aerospace business, and he felt that the problems in the bus and hydrofoil businesses were largely behind Grumman (423a). Paladino considered himself and his fellow Trustees to be "the most knowledgeable of the financial outlook of Grumman, which was most favorable" (468a).

The Trustees found significant the opinion of Dillon, Read & Co. rendered to the Grumman Board of Directors only twelve days previously, that LTV's offering price of $45 per share was inadequate (426a-27a; 468a). The Dillon, Read opinion was bolstered by a Lehman Brothers Kuhn Loeb report issued two months before the tender offer projecting future earnings for Grumman that, at the current price-to-earnings ratios, would have Grumman

shares trading well above the tender offer price of $45 per share. Paladino described the Lehman Brothers' report as containing "very very glowing prospects [for] Grumman." (472a; *see also* 391a).[7]

The Trustees concluded that the Plan should not tender the shares previously acquired and should increase the Plan's investment in Grumman up to, but not exceeding, the 10% limitation of section 407 of ERISA, 29 U.S.C. § 1107 (1976). The Trustees requested Mullan to ensure compliance with all regulatory requirements (392a-93a; 407a; 430a) and an application for an exemption from Rule 10b-6, 17 C.F.R. § 240.10b-6 (1981), was granted by the SEC on October 9.

The Trustees deferred implementation of their decision to increase the Plan's investment in Grumman securities and met briefly on October 12 to decide whether and when to implement their decision (393a-94a; 474a; 431a-32a). Following that meeting, William Parmentier, the Plan's Investment Manager, was given authority to purchase up to 1,275,000 shares of Grumman common stock (394a; 147a).

On October 12, Parmentier purchased at prevailing market prices 958,000 shares of Grumman and purchased an additional 200,000 shares on October 13 (498a; 147a). The purchases were executed through Dillon, Read at normal brokerage commissions rates (500a). No other investments were liquidated to pay for the shares (500a); the purchases were financed entirely from cash or cash equivalents (379a; 500a). The price for the shares ranged from $36 to $39¾ per share (147a).

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[7] The prospects for Grumman's earnings continue to be glowing. *See* Magnet, *Grumman's Comeback*, Fortune, Sept. 20, 1982 at 62, 72 ("The underlying value LTV saw in Grumman is no illusion . . . [Recent developments in its aerospace business] promise a stretch of prosperity such as Grumman hasn't seen in years.").

While the market price of the stock dipped to the mid-20's following an abandonment of the tender offer, on September 7, 1982, the stock closed on the New York Stock Exchange at $38½ per share, most of the gain having occurred during a falling market.

B. *The Proceedings Below*

The tender offer came to an abrupt halt on October 14, 1981 when the District Court preliminarily enjoined LTV from proceeding with its offer because it violated the antitrust laws and because LTV had failed to disclose in its tender offer documents, *inter alia*, the massive unfunded liabilities of its pension plans, 527 F.Supp. 86 (E.D.N.Y. 1981). On October 19, the D.O.L. filed suit (11a-27a).[8] Subsequently, the Court of Appeals affirmed the antitrust injunction, 665 F.2d 10 (2d Cir. 1981), and the tender offer was abandoned.

On the return date of its motion for a preliminary injunction and the appointment of a receiver, the D.O.L. offered no live witnesses. With the consent of the Trustees, the motion was submitted on the basis of documentary evidence (mostly public filings) and the transcripts of four depositions taken by the D.O.L., two depositions of D.O.L. officials taken on behalf of the Trustees, several affidavits with exhibits and a stipulation of certain background facts (98a-99a).

Also on the return date, a group of Plan participants applied for and were granted leave to intervene in opposition to the D.O.L.'s motion (68a; 97a). They presented to the District Court petitions which had been spontaneously circulated and over a period of a few days signed by over

[8] The basis for federal jurisdiction is section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1). Moreover, the D.O.L.'s claim arises under the laws of the United States, 28 U.S.C. § 1331.

18,000 of the 22,000 participants in the Plan expressing their strong support for the actions of the Trustees and their disapproval of the relief sought by the D.O.L. (87a-88a). The intervenors' position was based on their support and sympathy for the action which the Trustees had taken and on the fear that the court-appointed receiver would act "according to the short-term dictates of stock market prices and bottom-line fund market valuation rather than the long range viability of the fund." (92a)

On December 3, 1981 the District Court entered an order preliminarily enjoining the Trustees from buying, selling or taking any action with respect to Grumman shares held by the Plan which was followed by an order on January 11, 1982 continuing the injunction and ordering the appointment of a receiver for the Grumman shares.[9] On May 11, 1982 the Court of Appeals affirmed in part and reversed in part, concluding that the appointment of a receiver was unwarranted. The Court of Appeals reached this result, even though (i) it accepted the fact that the Trustees were "honestly convinced" that the tender offer posed "special dangers" to the Plan (680 F.2d at 276; 29A); and (ii) there was no evidence of potential harm to the Plan in the absence of an injunction.[10]

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[9] The injunction was granted despite the fact that from September 30, 1981 to November 30, 1981, the period covering the alleged paper losses to that date arising out of the purchases at issue, the Plan experienced a net unrealized gain on investments of $26 million, even after taking into account the paper loss on the Grumman stock purchased in October. Moreover, subsequent to the purchase of the Grumman stock the assets of the Plan were nearly $100 million greater than the amount which would be needed to pay all benefits if the Plan were terminated (226a).

[10] Indeed, the Court of Appeals noted that "[t]he financial integrity of the trustees is not questioned, as is demonstrated by the [district] court's willingness that they continue to act as such with respect to more than 90% of the Plan's assets [*i.e.*, assets other than shares of the employer-sponsor]." (680 F.2d at 276-77; 31A).

Reasons Why the Writ Should Be Granted

The United States Department of Labor (the "D.O.L.") described the appeal as raising "a policy question of truly national significance" (D.O.L. Br. p. 2) and the Second Circuit's opinion notes that "the question here at issue can arise for other companies." (680 F.2d at 270; 16A). This policy question of national significance has never before been addressed by this or any other Court.

The important policy question at the heart of this case is whether, in making investment decisions, officer-trustees may consider only market performance data or whether they may consider other economic consequences to the plan —in this case, the effect of a change in sponsors resulting from a tender offer. The Second Circuit's opinion answers the question by suggesting that "perhaps, after the events of late September, resignation was the only proper course" (680 F.2d at 276; 29A)[11] and by imposing on the Trustees' actions an unprecedented standard of review which is wholly unrealistic particularly in the context of a fast-moving hostile and contested tender offer.[12]

The threat of a draconian sanction encourages trustees either to avoid their responsibilities by doing nothing—even though affirmative action is strongly in the interest of the plan's participants—or by resigning at a time when

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[11] Elsewhere the Court observes that "[t]here is much to be said for the Secretary's argument . . . that the only proper course was for the trustees immediately to resign. . . ." (680 F.2d at 271; 19A-20A).

[12] Among other things the Court faulted the Trustees for not having a longer meeting, not hiring independent counsel (even though it identified no legal issue on which the Trustees were inadequately advised) and failing to secure investment advice beyond that available from Dillon, Read and the Lehman recommendation, even though such advice would have been plainly redundant.

their informed investment decisions are greatly needed by the plan, and turning the plan's management over to uninformed strangers ill-equipped to cope with such a situation in a prudent manner. Such a result is plainly contrary to the intention of Congress and certain to have a chilling effect upon trustees, who in the future are confronted with threats of this kind to the well-being of the pension plans they serve.

A. *The "Symbiotic Relationship" Between a Plan and its Sponsor*

The fundamental error in the Second Circuit's opinion is its failure to recognize and accept the conscious choice of Congress to foster and facilitate the mutually dependent relationship which inevitably exists between a plan and its sponsor. ERISA specifically allows corporate officers and employees, and even the corporation itself, to act in a fiduciary capacity with respect to an ERISA-governed pension plan maintained by the corporation, ERISA section 408(c)(3), 29 U.S.C. § 1108(c)(3) (1976). Indeed Congress recognized that the corporation or its officers and employees would frequently be serving as fiduciaries. *See, e.g.*, S. Conf. Rep. No. 93-1090, 93d Cong., 2d Sess. 297, 312 (1974).

It was with this mutual dependency in mind that Congress adopted section 407 authorizing trustees to invest up to 10% of plan assets in the sponsoring employers' securities. The 10% rule was the subject of considerable debate in Congress. Bills before the House and Senate during the 93d Congress included a broad range of options—from a complete bar to such purchases, a 5 percent rule and a 7 percent rule to the ultimate result embodied in section 407, the 10 percent rule. *See, e.g.*, S. 4, 93d Cong., 1st Sess. § 15(c)(4)(A) (1973) (10% rule); H.R. 2, 93d Cong., 2d Sess. § 15(b)(2)(A) (1974), as *reprinted in* 121 Cong. Rec.

S. 2631, S. 2611 (daily ed. Mar. 4, 1974) (7% rule); Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., II *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) 1727 (5% rule) (hereinafter cited as "II *Leg. Hist.*") (5% rule); II *Leg. Hist.* 1615 (0% rule).

In the midst of this controversy, the D.O.L. argued in favor of allowing a plan to invest up to 10% of the plan's assets in the employer's securities, not necessarily as the best investment available (determined on the basis of a purely financial analysis), but "in recognition of the symbiotic relationship" between the employer and the plan:

> "Especially significant among the expressly allowed transactions is that which permits, in most types of plans, investment of up to ten percent of the fund assets in securities issued by the employer of the employees who are participants in the plan. Since such an employer will often be an administrator of his plan, or will function as a trustee or in some other fiduciary capacity, this provision creates a limited exception to the listed proscription against self-dealing. The exception is made in recognition of *the symbiotic relationship* existing between the employer and the plan covering his employees." *Private Pension Plan Reform: Hearings Before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance*, 93d Cong., 1st Sess. 446 (1973) (statement of Department of Labor) (emphasis supplied).

The views of the D.O.L. on the ten percent rule ultimately prevailed in Congress and section 407 in its present form was enacted.[13]

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[13] The Senate Committee on Labor and Public Welfare adopted and repeated as its own the above-quoted remarks of the D.O.L. S. Rep. No. 93-127, 93d Cong., 1st Sess. 33 (1973).

Implicit in the phrase "symbiotic relationship" is the notion of "mutual cooperation" and "mutual benefit". *Webster's Third New International Dictionary of the English Language* 2316 (1961). In fact, the word "symbiosis" is generally "restricted to a *dependent relationship* that is *beneficial* to both participants." *The New Columbia Encyclopedia* 2672 (4th ed. 1975) (emphasis added).[14] Aware of this natural interdependence and beneficial interaction between an employer and its pension plan, Congress rejected a prohibition of plan purchases of employer securities, and expressly permitted up to 10% of the plan assets to be invested in the employer's securities.

The Second Circuit's opinion quotes the "symbiotic" language from the legislative history (680 F.2d at 271; 18A) but dismisses section 407 and the accompanying legislative history by misconstruing the argument advanced by the Trustees:

> "[The Trustees] argue . . . that, despite the words 'sole' and 'exclusive', such officers or directors do not violate their duties by following a course of action with respect to the plan which benefits the corporation as well as the beneficiaries.
>
> "We accept the argument but not the conclusion which appellants seem to think follows from it. Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation

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[14] *See also Webster's New World Dictionary of the American Language* 1442 (2d ed. 1976) ("1. *Biol.* the intimate living together of two kinds of organisms, esp. where such association is of mutual advantage. . . . 2. a similar relationship of mutual interdependence between persons or groups.").

or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries." (680 F.2d at 271; 19A).

This ignores the true thrust of the argument on which the Trustees rely. It has never been their position that section 407 merely allows investments which happen "incidentally" to benefit the employer-sponsor. Rather the argument is (and the legislative history and the decision in *Withers* v. *Teachers' Retirement System*, 447 F.Supp. 1248 (S.D.N.Y. 1978), *aff'd mem.*, 595 F.2d 1210 (2d Cir. 1979), we submit, bear it out) that trustees may act with the "eye single" which section 407 requires even though their investment of up to 10% of the plan's assets in the sponsor's stock is not otherwise justifiable on its investment merits,[15] where they believe, with good reason, that there is a net benefit (perhaps not quantifiable) to the participants and beneficiaries, flowing from the impact of the purchase on the fortunes or affairs of the sponsoring organization. The Trustees saw precisely such a benefit here.

The 10% limit and ERISA's endorsement of corporate officers serving as trustees, we submit, demonstrate that officer-trustees should be permitted to make decisions to invest in, tender or sell the sponsor's securities on behalf of the plan (up to the 10% limit), even though the corporation, independently, has an interest in the action they take, and that a court will only rarely be justified in second-guessing them. These judgments, involving as they do both investment evaluations and relationships between the company and the plan reflecting the "symbiosis" re-

[15] Of course, this Court need not go so far on the facts of this case because the Trustees had ample reason to conclude that the Grumman stock was a good, long-term investment (860a; *see also* 417a; 468a; 426a-27a) (and the subsequent price performance of the Grumman stock has borne out their judgment).

ferred to by Congress, should be made by Trustees familiar with the company's affairs rather than by the courts. The persons who occupy these important posts—dealing as they do on a daily basis with the welfare of the companies they serve and their stockholders and employees—require practical guidance in the discharge of their obligations, not a Sword of Damocles which is more promotive of hesitation and inaction than of the responsible and timely making and implementation of difficult decisions requiring the application of all of their knowledge and expertise. The 10% rule says, in effect, that, so long as no more than 10% of the plan's assets are committed to the sponsor's stock, the corporate fiduciaries can be trusted to make judgments with respect to that investment without an intrusive judicial supervision. As Senator Taft said in the course of the legislative debate: "the 10-percent figure would provide an adequate safeguard against self-dealing." II *Leg. Hist.* 1848.

B. *The "Prudent Man" and "Exclusive Purpose" Rules*

The Court's opinion erroneously described the duty of the Trustees as that of "the traditional 'prudent man'" (680 F.2d at 271; 18A). The Conference Committee's Report on ERISA took pains to note that:

> "[t]he conferees expect that the courts will interpret this prudent man rule (and the other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans." H. R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess (1974).

The significance of this comment was emphasized in an article, Note, *Fiduciary Standards and the Prudent Man Rule under the Employment Retirement Income Security Act of 1974*, 88 Harv. L. Rev. 960 (1975). The article points out that because of the unique nature of a "defined

benefit plan" "the central problem shaping the development of common law rules—the tension between the investment goals of the income beneficiary and the remainderman—need not be faced by pension plan fiduciaries", *id.* at 967. The authors also note that "unlike the typical private trust which receives capital only at its inception, private pension plans can expect regularly to receive new funds, freeing the trustee from liquidity pressures. . . ." *Id.* at 968. The Court's opinion fails to perceive, we submit, the central importance to the Plan of the financial well-being of the sponsor.

In determining what is prudent and what is in the interests of the participants and beneficiaries of the Plan, the Trustees are not limited to short-term market performance statistics and may consider the overall impact of the transaction on the Plan. The broad range of factors which a trustee may consider is reaffirmed by the D.O.L.'s regulations under ERISA section 404(a)(1)(B), which specifically provide that fiduciaries are "not necessarily limited to . . . taking into consideration the risk of loss and the opportunity for gain. . . ." 29 C.F.R. § 2550.404a-1 (b)(2) (1981). Thus, while loss and gain must be considered, other factors may be considered as well:

> "The concept of 'benefits,' however, need not be limited to payments that a participant or beneficiary would receive upon retirement, *i.e.*, pure economic return to an investment. It is arguably broad enough to include numerous types of positive returns, *e.g.*, job security and improved working conditions. Thus, this provision can be construed to allow a trustee to promote nontraditional objectives at the expense of adequate return and corpus safety if the investment produces a direct 'other benefit.'" Ravikoff & Curzan, *Social Responsibility in Investment Policy and the*

Prudent Man Rule, 68 Calif. L. Rev. 518, 532-33 (1980).[16]

The Trustees' actions here did not go nearly as far as the authors of the article suggest would be the full breadth of a trustee's lawful discretion: (i) these Trustees considered only the effect of a threatened change in sponsor on the benefits payable under the Plan and the security of those benefits, not on working conditions or job security; and (ii) they had solid ground to believe that in the long-term there was no "expense" to adequate return on investment or corpus security.

In this case, only economic considerations were taken into account by the Trustees: (i) the economic impact on the Plan of a change in sponsors; and (ii) the long-term prospects of Grumman stock. No showing has been made in this case that anything which these Trustees did, or failed to do, placed their actions outside the proper exercise of their responsibility. The record simply does not show that the hiring of another investment advisor would have been other than redundant, that there were fine points of ERISA as to which the advice of outside counsel was mandated or that a further factual investigation of the company with the tenth largest unfunded pension liability in the nation was necessary.

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[16] *See also ERISA Improvements Act of 1979: Hearings on S.209 Before the Senate Committee on Labor and Human Resources*, 96th Cong., 1st Sess. 7 (1979) (introductory remarks):

"[T]he framework of ERISA's present fiduciary responsibility rules, requiring that plan fiduciaries act 'solely in the interest' of plan participants and beneficiaries, 'for the exclusive purpose' of providing plan benefits and defraying administrative costs, and in a prudent fashion, *permits taking noneconomic issues into consideration when investment decisions are being made.*" (emphasis added).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Opinion of the Second Circuit, dated May 10, 1982

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 880, Docket 82-6004.

(Argued March 19, 1982 Decided May 10, 1982.)

RAYMOND J. DONOVON, Secretary of the United States Department of Labor,

Plaintiff-Appellee,

v.

JOHN C. BIERWIRTH, ROBERT G. FREESE and CARL A. PALADINO,

Defendants-Appellants,

and

JOSEPH W. ULLMAN, LILLIAN E. BALDISSARD, RITA V. HAFNER, ANTHONY PANCELLA, JR., KATHLEEN T. CHEW and BENJAMIN L. CREWS,

Intervenors-Appellants.

Robert N. Eccles, Atty., U. S. Dept. of Labor, Washington, D. C. (T. Timothy Ryan, Jr., Sol. of Labor, Monica Gallagher, Associate Sol., and Norman P. Goldberg, Sherwin S. Kaplan and Jane M. Kheel, Attys., U. S. Dept. of Labor, Washington, D. C., of counsel), for plaintiff-appellee.

Opinion of the Second Circuit, dated May 10, 1982

Raymond L. Falls, Jr., New York City (Cahill, Gordon & Reindel, David R. Hyde and P. Kevin Castel, New York City, of counsel), for defendants-appellants.

Before FRIENDLY and PIERCE, Circuit Judges, and METZNER, District Judge.*

FRIENDLY, Circuit Judge:

I. The Nature of the Action and the Proceedings in the District Court

This action was brought on October 19, 1981, by the Secretary of Labor (the Secretary) under § 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(1), in the District Court for the Eastern District of New York, against John C. Bierwirth, Robert G. Freese and Carl A. Paladino, Trustees of the Grumman Corporation Pension Plan (the Plan). The action stems from the unsuccessful tender offer by LTV Corporation (LTV) in the fall of 1981 for some 70% of the outstanding common stock and convertible securities of Grumman Corporation (Grumman) at $45 per share. At the time of the offer the Plan owned some 525,000 shares of Grumman common stock, which it had acquired in the mid-1970's. As hereafter recounted, the Plan not only declined to tender its stock but purchased an additional 1,158,000 shares at an average price of $38.27 per share, at a total cost of $44,312,380. These acts, the Secretary's complaint alleged, constituted a violation of §§ 404(a) and

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* Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

406(b) of ERISA, 29 U.S.C. §§ 1104(a) and 1106(b) which we set out in the margin.[1]

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[1] § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

§ 1106. Prohibited transactions

(b) A fiduciary with respect to a plan shall not

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Simultaneously with filing the complaint, the Secretary moved for a temporary restraining order and preliminary injunction, to prohibit the Trustees of the Plan from buying, selling or exercising any rights with respect to Grumman securities and to appoint a receiver for the securities already held by the Plan. On October 19 the motion for a temporary restraining order came on for hearing before Judge Mishler, who had already, on October 14, 1981, issued an order temporarily enjoining the tender offer because of inadequate disclosure and threatened violation of § 7 of the Clayton Act, *Grumman Corp.* v. *LTV Corp.*, 527 F.Supp. 86, which this court was later to affirm on November 13, 1981, 665 F.2d 10. Counsel appearing for the trustees agreed to maintain the *status quo* until the motion for a preliminary injunction and the appointment of a receiver could be brought on for hearing on October 30, 1981; on that basis the motion for a temporary restraining order was withdrawn. No testimony was taken at the October 30 hearing; the matter was submitted on affidavits, depositions, public filings and a stipulation of background facts. A number of participants in the Plan were allowed to intervene as defendants; a supporting affidavit of one of the Plan participants alleged that:

> [S]pontaneously and within days after this suit was commenced, Grumman employees at all levels and in all departments began to circulate petitions expressing their approval of the trustees' actions, as participants in the Pension Plan. To date, petitions have been signed by approximately 17,000 of the 22,000 employees who are Plan participants and beneficiaries.

On December 3, 1981, the district court, 538 F.Supp. 463, rendered an opinion containing its findings of fact and con-

clusions of law. Joint App. 193a. After rejecting the Secretary's contention that the trustees committed *per se* violations of ERISA and making a detailed survey of the evidence, the Judge concluded that the Secretary had "shown a likelihood of success on his claim that each of the trustees has acted imprudently with respect to their recent investment decisions concerning Grumman stock". He invited suggestions with respect to the form of preliminary relief. The trustees proposed that if the court felt it necessary to go beyond a preliminary injunction with respect to dealings in Grumman securities, it should adopt a proposal of the Grumman board, embodied in a resolution passed on December 17, 1981, that the board, with all management directors abstaining, should appoint three non-management directors as interim trustees. Declining this proposal the judge entered an order which preliminarily enjoined the trustees from buying, selling or exercising any rights with respect to Grumman securities except upon further order of the court and directed the appointment of a receiver to serve as an "Investment Manager" for Grumman securities owned by the Plan, with "power to sell, tender for sale, or otherwise dispose of all or part of such stock or securities." The order contained elaborate provisions concerning the qualifications, method of appointment and compensation of the Investment Manager. The provisions with respect to the Investment Manager were stayed on condition "that defendant promptly request and diligently pursue an expedited appeal" to this court, which was done.

II. The Facts

The LTV tender offer followed a scenario that has become familiar. On September 21, 1981, in the absence of

defendant Bierwirth, Chairman of the Board of Grumman, who was on vacation, Joseph O. Gavin, Jr., President of Grumman, received a telephone call from Paul Thayer, Chairman of the Board and Chief Executive Officer of LTV, inviting him to discuss a possible merger. Gavin rejected the invitation. Evidently unsurprised, LTV, prior to the opening of trading on the New York Stock Exchange on September 23, issued a press release announcing that it was planning to make a cash tender offer at $45 per share for up to 70% of Grumman's common stock and securities representing or convertible into common stock. According to the press release, the offer constituted "the first step in a plan to acquire 100% of the voting equity of the Grumman Corporation". On September 21 and 22 Grumman stock had sold on the New York Stock Exchange at prices ranging between 23⅞ and 27¼. Later in the morning of September 23 Grumman put out a release on the Dow Jones News Service in Bierwirth's name stating that the Grumman directors would promptly consider the proposed offer. The release noted that the board would "consider legal factors including antitrust implications,"[3] warned stockholders not to act hastily and said that Dillon, Read & Co. had been retained to provide advice regarding the LTV offer. On the same day LTV delivered to Bierwirth's office a letter expressing regret at the lack of a meeting in which LTV would have had an "opportunity to spell out in a personal way how . . . combination would be beneficial to the shareholders, employees, and communities served by Grumman", and stating that "[t]he headquarters of a combined Grumman-Vought aerospace operation would be established

[3] These arose from the fact that one of LTV's subsidiaries was Vought Corporation which, like Grumman, was a manufacturer of military aircraft and airframe subassemblies.

in Bethpage, Long Island [Grumman's headquarters] under a top management team that would include you as CEO as well as Joe Gavin and George Skurla from Grumman and Bob Kirk from Vought." Thayer continued to hope for "the opportunity to explain to you in more detail the advantages of the synergistic combination" he had proposed and enclosed a copy of the press release.

The LTV offer was made on September 24. It was conditioned upon the tender of a minimum of 50.01% of Grumman's common stock and securities representing or convertible into common stock. The withdrawal/proration date was 12:01 A.M. on October 16, 1981; the termination date was 12:01 A.M. on October 23. Bierwirth cut short his vacation and reached the Grumman office at midday on September 24.

Although SEC Rule 14e-2, 17 C.F.R. § 240.14e-2, gave the Grumman board 10 business days from the commencement of the offer to communicate its position, if any, the board lost no time in going into action. It met on September 25. By then the LTV offer had caused the price of Grumman stock to rise to a range of 32⅝ to 34¼. The board had before it a two page letter of Dillon, Read & Co., Inc., which had served Grumman as investment banker, stating in a conclusory fashion that it was "of the opinion that the offer is inadequate from a financial point of view to holders of the Grumman securities." The letter said this conclusion was based on

> certain information of a business and financial nature regarding Grumman which was either publicly available or furnished to us by Grumman and [on] discussions with the management of Grumman regarding its business and prospects.

The letter made no attempt at quantification of these factors, and no representative of Dillon, Read attended the meeting for questioning, although apparently there were some supporting financial materials available. Defendant Robert G. Freese had also prepared some projections which are not in the record. The board unanimously adopted a resolution to oppose the tender offer, and issued a press release to that effect, saying that the board had concluded that "the offer is inadequate, and not in the best interests of Grumman, its shareholders, employees or the United States."

On September 28 Grumman began the previously mentioned action which was to lead to the injunction of the tender office. On the same day defendant Bierwirth, Chairman of the Board of Grumman, sent a letter to the company's shareholders seeking their help in defeating the offer. The letter stated:

> We're very optimistic about our chances of defeating the takeover bid. About a third of all shares are held by Grumman's employee investment and pension plans. These plans are managed by Grummanites who will look long and hard at how well their fellow members would be served by selling off Grumman stock. Much of the rest is owned by Grumman people who, I believe, understand their future is worth more than a quick return on a block of shares.

The reasons given for opposing LTV's offer were the inadequacy of the price and others, relating to the pension fund, set forth in the margin.[3] The letter concluded by

[3] There's one other factor to keep in mind: your pension fund. It's Grumman's policy to fully fund its employee pension fund.

announcing that "Grumman's management is totally committed to defeating this takeover attempt", and by pleading "If you own Grumman shares, don't sell out to LTV".

On September 30, at the invitation of George Petrilak, President of the Grumman Retirees Club, Bierwirth met with 300 retirees to discuss the LTV offer. An affidavit of Petrilak avers that "there was great concern expressed by the members as to the possible impact of LTV succeeding in their tender offer upon their pensions," and said that "[t]he overwhelming attitude of the retirees was 'what is good for Grumman is good for retirees'". The Club purchased an advertisement appearing in Newsday, a Long Island newspaper, on October 13, headed

Grumman retirees protect your pension.
Do not tender your stock to LTV.

Expectably, Bierwirth spent about 90% of his time during the next fortnight in activity directed to opposing the LTV offer. Freese devoted at least half his time to arranging an "additional bank credit facility". This was done "without any specific plans as to the use of the proceeds" in order "to have as much borrowing capability as possible in the event the Board wanted to take some action. . . ." Two borrowings had been made as of the date Freese's deposition was taken. One was for "compensating balances that are required under the agreement itself"; the second was "to have the funds available to pay for . . . up to a million shares of Grumman common stock."

The Grumman Pension Plan, established in 1943, is a "defined benefit plan" within the meaning of § 3(35) of ERISA,

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In contrast, LTV's pension fund right now is underfunded by almost a quarter of a billion dollars. Grumman people could lose if the two funds were to be merged.

29 U.S.C. § 1002(35),[4] meeting the requirements for qualification under § 401(a) of the Internal Revenue Code and covering both salaried and hourly employees. Initially banking institutions had acted as trustees of the Plan. However, in 1973 Grumman adopted a policy of having officers of Grumman or its affiliates serve as trustees; as permitted by § 408(c)(3) of ERISA, 29 U.S.C. § 1108(c)(3). The trustees in the fall of 1981 were Bierwirth; Freese, chief financial officer of Grumman since 1972; and Carl A. Paladino, Treasurer of Grumman Aerospace Corporation since 1969. John Mullan, associate general counsel of Grumman, has served as counsel to the trustees and regularly attended their meetings. Sometime prior to January 1, 1975, the Plan had acquired 525,000 Grumman shares.

On September 28 Freese mentioned to Bierwirth that the trustees "are going to have to get together here at some point and decide what [to] do in regard to the holdings of Grumman stock." Bierwirth agreed and said he would call Paladino. During the next ten days, the three trustees had casual conversations as they happened to meet each other. Nothing was said about the Plan's buying Grumman shares and no financial data were assembled for the meeting. Bierwirth had been informed by Mullan that if LTV succeeded, it could "merge the pension Plan though it may take them some time" and also "could cancel the Plan to the extent that they eliminate the Fund although of course they would retain the corporate obligation to pay", and by unidentified

[4] Under a defined benefit plan, 29 U.S.C. § 1102(35), the sponsoring corporation fixes the benefit levels for employee pensions and, based upon actuarial assumptions concerning investment return, mortality rates and so forth, contributes funds to the plan sufficient to pay these benefits. See Note, Fiduciary Standards and the Prudent Man Rule Under the Employment Retirement Income Security Act of 1974, 88 Harv.L.Rev. 960, 961-62 (1975).

other sources that changing the presumed earnings rate would permit the declaration of some of the fund as surplus and recapture for the corporation.

What occurred at the Plan trustees' meeting, which was held on October 7, was described in the depositions of the three trustees. Freese's is the most detailed; we shall follow it, with supplementation from the others when required. Mullan made a ten minute presentation dealing with ERISA, pointing out that the trustees' decisions "as far as the Grumman stock was concerned had to be predicated solely upon the best interests of the participants of the Plan". There was then a general discussion of how the trustees felt about LTV, the Dillon, Read opinion letter, and Freese's five year financial projections for Grumman. Elaborating on the discussion of LTV, Freese mentioned concern about the underfunding of "their pension plan", LTV's highly leveraged debt situation which would be aggravated by the need for borrowing to finance the acquisition of Grumman, contingent liability with respect to environmental problems and a large number of pending lawsuits and alleged SEC violations, all of which was revealed in a recent LTV prospectus.[5] The same information was contained in LTV's annual report and in its other publicly available filings. Freese expressed concern that the assumed rate of return used by LTV's pension plan was higher than that used by other companies and that LTV would have trouble making contributions to their pension plan. Bierwirth testified that the trustees "were aware of"

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[5] The prospectus, dated May 28, 1981 was in connection with a public offering of 4,000,000 shares of LTV of $24.50 per share. The syndicate managers were Lehman Brothers Kuhn Loeb Incorporated and Merrill Lynch White Weld Capital Markets Group. On September 24, 1981, the closing price of these shares was $14.75.

a report about Grumman by Lehman Brothers Kuhn Loeb Inc. (Lehman Brothers). This report, dated July 8, 1981, which recommended purchase of Grumman common stock, then selling at $28 per share, projected a 1981-84 earnings progression of $2.75, $5.00, $6.50 and $7.50, and contained financial analysis supporting the estimates. The report's projection of greater sales was stated to be based primarily on "[i]ndications . . . that [President] Reagan's request [for increased expenditures for military aircraft] will be approved by Congress" and Grumman's "promising diversification into aerospace subcontracting. . . ."[6]

After a half hour's discussion the trustees voted not to tender the 525,000 Grumman shares held by the Plan. According to Bierwirth the trustees "then discussed whether we should take a second step. If we did not want to tender the stock at $45 a share, should we then consider buying additional shares, the market then being in the 30's?" A merit of such a purchase would be in making it more difficult for LTV to gain control of the pension fund. However, "it was also important that a further investment in Grumman shares be the right thing for us to do." "[A] number of fortuitous events had occurred during the summer and early in September which greatly enhanced the outlook for Grumman" and had made Bierwirth "feel earlier that a further investment in Grumman was desirable and should be recommended to the Trustees come this fall." While it had been "very difficult to accumulate substantial positions in Grumman stock", which ordinarily traded at volumes of 20,000

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[6] The district judge erred in referring to this report as having been "prepared with LTV's unique financial position and business objectives in mind." It was an investment recommendation prepared by Christopher C. Demish of Lehman Brothers' Research.

shares a day, the daily volume of half a million shares induced by the LTV offer made it "possible to accumulate a major position in Grumman stock without affecting the price all that much." Bierwirth was then of the view that "probably a majority of the stock would not be tendered" but could not feel confident about it. He recognized that if the LTV tender offer were abandoned, selling by arbitrageurs would push the price down. Following their discussion of these ideas, the trustees concluded that purchase of Grumman stock up to the maximum of 10% of the value of the Plan's assets permitted by § 407(a)(2) of ERISA, 29 U.S.C. § 1107(a)(2), would be prudent.

Two steps were taken shortly after the meeting: Grumman applied to the SEC for an exemption from rule 10b-6, 17 C.F.R. § 240.10b-6, which was thought necessary to permit the Plan to purchase additional Grumman shares. Grumman and the trustees executed an amendment of the trust agreement adding a new paragraph which, among other things, provided that Grumman should indemnify and hold harmless each trustee from any liability or expense arising out of any act of failure to act pursuant to the trust unless the liability or expense resulted from willful misconduct or lack of good faith. Authorization of the planned purchases was deferred until the SEC had acted on Grumman's request for an exemption from SEC rule 10b-6. On October 8 a press release announced the decision of the trustees not to tender the Plan's shares.

The request to the SEC was granted on Friday, October 9. The trustees met briefly on Monday, October 12, and authorized the Plan's purchase of 1,275,000 additional Grumman shares—just short of ERISA's 10% limitation. A press release issued on October 13 stated that use of the authorization would increase the Plan's owner-

ship of Grumman stock from 3.8% to approximately 8% of the outstanding fully diluted shares. The Plan, acting through Dillon, Read, purchased 958,000 shares at an average price of $38.61 per share on October 12 and an additional 200,000 shares on October 13 at an average price of $36.62, for a total cost of $44,312,380.

On the next day, October 14, as previously indicated, the district court temporarily enjoined the LTV offer, thereby drastically reducing its chances for success. The price of Grumman stock fell on October 15 to a range of 28¼-29½. After this court affirmed the temporary injunction, the price of Grumman shares was 28-28¾; the market value of the newly purchased shares was approximately $32,500,000. As this is written, the price is 26¼-26⅜.

III. The Scope of Review

Despite oft repeated statements that the issuance of a preliminary injunction rests in the discretion of the trial judge whose decisions will be reversed only for "abuse", a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law, *Ring* v. *Spina*, 148 F.2d 647, 650 (2 Cir. 1945); *Carroll* v. *American Federation of Musicians*, 295 F.2d 484, 488-89 (2 Cir. 1961); *Douglas* v. *Beneficial Finance Co.*, 469 F.2d 453, 454 (9 Cir. 1972), or of the standards governing the granting or denial of interlocutory relief, *Exxon Corp.* v. *New York*, 480 F.2d 460, 464 (2 Cir. 1973); *Dino DeLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F.2d 373 (2 Cir. 1966). A line of cases in this circuit, apparently having its source in *Dopp* v. *Franklin National Bank*, 461 F.2d 873, 878-79 (1972), has gone beyond this and held that, even when the district court has not thus erred, where that court did not hear

live witnesses, whose credibility played an essential part in its determination, and the case was decided on the basis of pleadings, affidavits and depositions, which the court of appeals is in as good a position as the district judge to read and interpret, the appellate court is not limited to reversal for abuse of discretion. The description of how far the limit is transcended has varied—the appellate court has "broader discretion on review", *Dopp, supra*, 461 F.2d at 879; it is "able to exercise its discretion and to review the papers *de novo*", *San Filippo* v. *United Brotherhood of Carpenters & Joiners*, 525 F.2d 508, 511 (2 Cir. 1975); it "is not limited to reviewing the district court's exercise of discretion", *Forts* v. *Ward*, 566 F.2d 849, 852 n.8 (2 Cir. 1977); it may exercise "full review", *Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2 Cir. 1979); *Crouse-Hinds Co.* v. *Internorth, Inc.*, 634 F.2d 690, 701 n.19 (2 Cir. 1980); and it "may consider the record *de novo*", at least when mandatory relief changing the *status quo* has been granted, *Doe* v. *New York University*, 666 F.2d 761, 765 (2 Cir. 1981). Two recent opinions have suggested that the use of the power to go beyond the "abuse of discretion" standard is itself discretionary, *New York* v. *Nuclear Regulatory Comm'n*, 550 F.2d 745, 750-53 (2 Cir. 1977); *Vidal Sasson, Inc.* v. *Bristol-Myers Co.*, 661 F.2d 272, 276 n.9 (2 Cir. 1981), with the former suggesting some guidelines as to how the discretion should be exercised. Factors favorable to the exercise of appellate discretion to engage in full review are that interlocutory relief has been granted rather than denied, lack of specificity in the findings of the trial court, and "defects, apart from the findings themselves, in the district court proceedings, which this court

apparently believed justified a broader review of the lower court's proceedings. . . ." [7]

Whatever the end of this debate may be, we think this case is peculiarly one for applying a broad standard of review. The district judge's decision hinged on his view that ERISA imposed a high standard of fiduciary duty on the defendants. If he set the hurdle too high, his result could well be wrong. Judge Mishler did not consider that he was exercising discretion in finding that the trustees had violated their fiduciary duties; he regarded that conclusion as compelled. There is no real dispute over what did and what did not occur. The quarrel is over the legal standard and its application to facts not seriously in dispute. Thorough review at this point should be helpful not only to the parties but to the district judge in indicating the points that deserve further exploration at the trial. Moreover, the question here at issue can arise for other companies. We would ill perform our duties by a decision affirming the district court because of limitations on the scope of review, thereby necessarily implying that we would equally have upheld a contrary ruling.

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[7] Judge Oakes' opinion in the *Nuclear Regulatory* case pointed out that the principle of broader review of the grant or denial of preliminary injunctions where no live testimony was heard is closely related to the view taken by this court in *Orvis* v. *Higgins*, 180 F.2d 537, 539-40 (2 Cir.) (Frank, *J.*), *cert. denied*, 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 596 (1950), with respect to the diminished effect of F.R.Civ.P. 52(a) in such cases and cited a statement in *Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.*, 505 F.2d 989, 1004 (2 Cir. 1974), that:

> *Orvis* stands for the proposition that a record consisting only of pleadings, depositions, and affidavits may, at the reviewing court's discretion, be reviewed de novo.

However, the *Pan American* case was one where "a great deal of the evidence" consisted of oral testimony, *id.*, and the characterization of the proposition stated by *Orvis* as discretionary thus was dictum.

IV. The Legal Standard

We deal first with the contention, advanced by the Secretary in passing, that the result reached by the district judge was compelled on a ground rejected by him, namely, that the trustees, at least in their purchase of Grumman stock, violated the specific prohibitions of § 406(b) of ERISA. The only such prohibition that is arguably applicable is § 406(b)(2), see note 1 *supra*.

We hold that the section does not apply. The "party" that the trustees are claimed to have been acting on the behalf of or to have been representing presumably is Grumman. We read this section of the statute as requiring a transaction between the plan and a party having an adverse interest. Such was the case in the only appellate decision cited to us by the Secretary, *Cutaiar* v. *Marshall*, 590 F.2d 523, 529 (3 Cir. 1979). This also was true in *Freund* v. *Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D. Wis. 1979). *Marshall* v. *Kelly*, 465 F.Supp. 341 (W.D. Okl. 1978) and *Gilliam* v. *Edwards*, 492 F.Supp. 1255 (D.N.J. 1980), also cited by the Secretary, were cases of self-dealing clearly prohibited by § 406(b)(1). We see no reason to think Congress intended the expansive interpretation of the various specific prohibitions of § 406 urged by the Secretary, particularly in light of the inclusion of the sweeping requirements of prudence and loyalty contained in § 404.

Sections 404(a)(1)(A) and (B) impose three different although overlapping standards. A fiduciary must discharge his duties "solely in the interests of the participants and beneficiaries." He must do this "for the exclusive purpose" of providing benefits to them. And he must comply "with the care, skill, prudence, and diligence under

the circumstances then prevailing" of traditional "prudent man".

The trustees urge that the mandates of § 404(a)(1)(A) and (B) must be interpreted in the light of two other sections of ERISA. One is § 408(c)(3), 29 U.S.C. § 1108(c)(3), which permits the appointment of officers of the sponsoring corporation as trustees. The other is § 407(a)(3), 29 U.S.C. § 1107(a)(3), which, as here applicable, permitted the Plan to acquire Grumman stock having an aggregate fair market value not exceeding 10% of the fair market value of the assets of the Plan. The provision, the trustees point out, was the result of a lengthy debate in which the Department of Labor played an important role; they rely especially on the following passage from its statement to the Senate Finance Committee:

> Especially significant among the expressly allowed transactions is that which permits, in most types of plans, investment of up to ten percent of the fund assets in securities issued by the employer of the employees who are participants in the plan. Since such an employer will often be an administrator of his plan, or will function as a trustee or in some other fiduciary capacity, this provision creates a limited exception to the listed proscription against self-dealing. The exception is made in recognition of *the symbiotic relationship* existing between the employer and the plan covering his employees. *Private Pension Plan Reform: Hearings Before the Subcomm. on Private Pension Plans of the Senate Comm. on Finance*, 93 Cong., 1st Sess. 446 (1973) (statement of Department of Labor) (emphasis supplied).

Appellants do not contend that these provisions relieve corporate officers or directors who are trustees of a plan

of the duties imposed by § 404(a) when dealing with stock of the corporation which is an asset of the Plan. They argue rather that, despite the words "sole" and "exclusive", such officers or directors do not violate their duties by following a course of action with respect to the plan which benefits the corporation as well as the beneficiaries.

We accept the argument but not the conclusion which appellants seem to think follows from it. Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. Restatement of Trusts 2d § 170 (1959); II Scott on Trusts § 170, at 1297-99 (1967) (citing cases and authorities); Bogert, The Law of Trusts and Trustees § 543 (2d ed. 1978). This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.

There is much to be said for the Secretary's argument that the participation of Bierwirth and Freese in the directors' decision of September 25 press release announcing the unanimous decision of the board to do this on the ground, *inter alia*, of its inadequacy; the sending of Bierwirth's letter of September 28 repeating this and also announcing that the LTV offer was a threat to the pension fund; and the other activities of Bierwirth and Freese

in opposing the offer precluded their exercising the detached judgment required of them as trustees of the Plan, and that the only proper course was for the trustees immediately to resign so that a neutral trustee or trustees could be swiftly appointed to serve for the duration of the tender offer.[8] Looking at the matter realistically we find it almost impossible to see how Bierwirth and Freese, after what they had said and done between September 24 and October 7, could have voted to tender or even to sell the Plan's stock, no matter how compelling the evidence for one or the other of those courses might have been.[9]

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[8] It could be said against this that Bierwirth and Freese were fiduciaries for the Grumman stockholders and that if their actions before the trustees' meeting on October 7 met their duties as such, no harm was done by their prejudgment. However, as Justice Frankfurter observed in a famous passage, "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?" *SEC* v. *Chenery Corp.*, 318 U.S. 80, 85-86, 63 S.Ct. 454, 458, 87 L.Ed. 626 (1943). The fiduciary obligations of the trustees to the participants and beneficiaries of the plan are those of trustees of an express trust—the highest known to the law. Restatement of Trusts 2d § 2, comment b (1959). The trustees do not even contend that the quick judgment made at the directors' meeting of September 25 satisfied their obligations under § 404(a)(1)(A) and (B). Whether it satisfied their obligations to Grumman shareholders is not before us.

[9] We are not impressed with the defendants' argument that they, and particularly Bierwirth, had nothing to fear from the LTV offer in light of LTV's announced intention to make Grumman's office the headquarters of its aerospace division and to retain Bierwirth as C. E. O. of that division. No offer was made with respect to Freese or Paladino. Even as to Bierwirth there have been countless instances where, even when a proposal to retain the chief executive of the target was wholly sincere, he will have disappeared within a year or so. Moreover, being C. E. O. of a division of LTV was not the same thing as being C. E. O. of an independent Grumman. The press currently recounts how high corporate executives are equipping themselves with "golden parachutes" providing large benefits in the event that the executive is dismissed or even if he quits on his own volition after a takeover.

Grumman shareholders who had acted in accordance with the company's pleas would have had every reason to consider such action a breach of faith. Even though the district judge had not seen or heard Freese, he was not required to accept Freese's deposition testimony that his mind "was not absolutely made up" until he got to the October 7 meeting and that he "hadn't predecided" what his answer would be. "[W]e are not to close our eyes as judges to what we must perceive as men." *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920) (Cardozo, J.), *cert. denied sub nom. State Tax Commissioner* v. *People ex rel. Alpha Portland Cement Co.*, 256 U.S. 702, 41 S.Ct. 624, 65 L.Ed. 1179 (1921). In this respect, as in others, the case differs vitally from *Withers* v. *Teachers' Retirement System*, 447 F.Supp. 1248 (S.D.N.Y. 1978) (Conner, J.), *aff'd mem.*, 595 F.2d 1210 (2 Cir. 1979), on which the trustees heavily rely.

We are not, however, required to go so far in this case. The record contains specific instances of the trustees' failure to observe the high standard of duty placed upon them. Bierwirth and Freese should have been immediately aware of the difficult position which they occupied as a result of having decided as directors some of the same questions they would have to decide as trustees, and should have explored where their duty lay.[10] Instead the question of a trustees' meeting was treated quite casually—something to be attended to when the hectic pace of fighting the tender offer would permit. One way for the trustees to inform themselves would have been to solicit the advice of independent counsel; Mullan, a junior Grumman employee,

[10] Bierwirth was a law school graduate and had practiced for 3 years.

was under disabilities similar to those of the trustees themselves. He could hardly have been expected to tell the trustees that the better course would be to resign or even to suggest investigations which might alter the judgment of total commitment to defeating the LTV offer that management had already expressed. We do not mean by this either that trustees confronted with a difficult decision need always engage independent counsel or that engaging such counsel and following their advice will operate as a complete whitewash which, without more, satisfies ERISA's prudence requirement. But this was, and should have been perceived to be, an unusual situation peculiarly requiring legal advice from someone above the battle.

The trustees also failed to measure up to the standard required of them in failing to do a more thorough job in ascertaining the facts with respect to the LTV pension funds, the unfunded liabilities of which were to be a principal ground for their action, and investigating whether anything could be done to protect the Grumman pension fund in the event of an acquisition of Grumman by LTV. So far as the record show, the sole knowledge the trustees had of the LTV pension plans came from two portions of the prospectus for the May 28, 1981, LTV stock offering which we set forth in the margin.[11] The September 28

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[11] Retirement Plans

The Company has retirement plans covering substantially all of its employees. It is the policy to accrue retirement costs, including amortization (primarily over 40 years) of prior service costs. Contributions are made to Company sponsored retirement plans in accordance with the minimum funding requirements of the Employee Retirement Income Security Act of 1974, and to multi-employer plans as required by collective bargaining agreements for the Company's seagoing, longshore and mining employees.

Note G—Employee Compensation and Benefits

Included in the noncurrent liability for employee compensation and benefits was approximately $225,000,000 and

letter from Bierwirth to Grumman's shareholders drew on the prospectus' statement about unfunded liabilities but eliminated the phrase "which relates primarily to unfunded vested pension liabilities assumed in the purchase of Lykes". The omission of this clause was important because it created the false impression, on the basis of which the trustees could well have acted, that LTV had a single pension fund which had unfunded liabilities in the considerable amount stated. If, as the prospectus foreshadowed and investigation would have confirmed, the unfunded liabilities were principally in pension funds covering hourly employees of LTV's steel operations,[12] the danger of these plans being merged with Grumman's

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$227,000,000 at December 31, 1980 and 1979, respectively, which relates primarily to unfunded vested pension liabilities assumed in the purchase of Lykes.

Costs under retirement plans were $167,600,000 in 1980, $167,300,000 in 1979 and $95,100,000 in 1978. The accumulated plan benefits and plan net assets for the Company's defined benefit plan as of the most recent date (January 1, 1980) were as follows (in thousands):

Actuarial present value of vested accumulated plan benefits	$1,322,313
Net assets available for plan benefits	1,273,505
Excess	$ 48,808
Actuarial present value of nonvested accumulated plan benefits	$ 166,059

The weighted average assumed rate of return used in determining the actuarial present value of accumulated plan benefits was 10 percent. The actuarial present values of accumulated plan benefits of the Company's seagoing, longshore and mining employees covered by multi-covered plans are not currently determinable.

As mentioned above, similar information appeared in LTV's annual report and its other publicly available filings.

[12] Even at the time of his deposition Paladino did not know which of LTV's plans had the unfunded liabilities.

was considerably less than if LTV had a single underfunded pension fund.

The trustees' perception of danger would have been reduced yet further had they known that LTV treated a number of the 21 pension plans which it sponsored quite well. For example, the pension plan for salaried Vought employees was extremely well-funded, with an excess of current assets over vested liabilities of approximately $78,000,000. Other Vought plans, including one covering hourly workers, had not been treated so favorably, but nonetheless were in better financial condition than LTV's plans for employees in the steel industry. The means for the trustees to conduct speedy investigation were readily at hand. The trustees knew that LTV was obliged to file with the Internal Revenue Service and the Secretary of Labor reports (Form 5500's) with respect to each of its pension funds. They made no effort to examine these. Counsel tells us that examination of the reports would have shown the unfunded liabilities to have been even greater than disclosed in the prospectus, an aggregate of approximately $378,000,000 rather than $225,000,000, as of December 31, 1980. Apart from Judge Mishler's observation that "Luck or good fortune is no substitute for a trustee's duty of inquiry," the investigation would have shown also that LTV maintains separate pension plans for employees in different industries and some 93% of the unfunded liabilities were in the pension funds covering LTV's steel operations, which there would have been reasons to believe posed little danger to the Grumman Plan.[13] Further inquiry in these areas, as well as those

[13] The trustees might also have inquired whether, as an affidavit submitted on behalf of the Secretary asserts, Joint App. 164a-65a, the unfunded liabilities relating to LTV's steel operations were attributable to causes other than LTV's particular policies.

mentioned immediately below, might well have changed the trustees' views regarding both the danger presented by LTV's offer to the Plan and their ability to obtain satisfactory protections from LTV for the Plan. In addition, even if the trustees' beliefs regarding the financial condition of LTV's pension plans and LTV's policies towards its plans had been entirely accurate, we see little in the record to indicate that they attempted to determine just what LTV could have done and could not have done to inflict financial harm upon the participants in Grumman's Plan.[14] The trustees easily could have retained an expert on ERISA to advise them on this subject.

The trustees were also too cavalier in their treatment of public statements by LTV that it did not intend to touch the Plan. To be sure, as Bierwirth testified, very few assurances could be proof against serious financial difficulties of LTV. Nonetheless, the trustees were bound to take LTV up on its statements and see how far, if at all, it was willing to place these in binding form. If it was, that would have gone at least part of the way in alleviating the trustees' concerns; if it was not, its refusal would have confirmed them. It is true that even if LTV had been completely forthcoming the trustees might still have been justified in concluding that its debt-ridden balance sheet was a sufficient basis for concern, but they would have reached that conclusion after having made

[14] Counsel for the trustees argue that LTV could have merged the Grumman plan with an LTV plan, appointed new trustees, terminated the Grumman plan, and so forth. ERISA, of course, contains elaborate safeguards to protect employees from the financial consequences of such actions, *e.g.*, 29 U.S.C. §§ 1058, 1342, 1344; IRC §§ 411, 412, 414. Counsel for the trustees have not suggested how LTV could have avoided such safeguards, much less that the trustees seriously considered these factors in making their decision at the October 7 meeting.

every reasonable effort to see how much protection LTV would have afforded—a question which likely can no longer be answered. See *Withers* v. *Teacher's Retirement System, Inc., supra,* 447 F.Supp. at 1259.

However, we are not obliged to decide whether the district court would have been justified in awarding preliminary injunctive relief on these facts alone. An even more telling point against the trustees is their swift movement from a decision not to tender or sell[15] the shares already in the fund to a decision to invest more than $44,000,000 in the purchase of additional Grumman shares up to the 10% maximum permitted by § 407(a)(2) of ERISA. Their argument is that once they had reasonably decided not to tender the shares already in the fund since success of the offer would run counter to the interests of the beneficiaries, it followed that they should do everything else they lawfully could do to thwart the offer. This, however, should have involved a calculation of the risks and benefits involved. Bierwirth properly conceded that a further investment in Grumman shares had to be "the right thing for us to do." The trustees' consideration of this was woefully inadequate. Although Grumman shares may have seemed attractive when selling in the high 20's, with what appeared a good chance of appreciation, see note 6 *supra* and accompanying text, they were not necessarily attractive when, under the impetus of the tender offer, they had risen to the high 30's. Moreover, and even more important, in purchasing additional shares

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[15] The record does not indicate that sale was even considered, although the course had some attractions. It would have eliminated the possibilities that if the Plan did not tender and the offer succeeded, the Plan might be left as a minority stockholder in an LTV controlled Grumman, and that, if the Plan did tender and the offer succeeded, the Plan might be left with some Grumman stock, because of the 70% maximum in the tender offer.

when they did, the trustees were buying into what, from their own point of view, was almost certainly a "no-win" situation. If the LTV offer succeeded, the Plan would be left as a minority stockholder in an LTV-controlled Grumman—a point that seems to have received no consideration. If it failed, as the Plan's purchase of additional 8% of the outstanding Grumman stock made more likely, the stock was almost certain to sink to its pre-offer level, as the trustees fully appreciated. Given the trustees' views as to the dim future of an LTV-controlled Grumman, it is thus exceedingly difficult to accept Bierwirth's testimony that the purchase of additional shares was justified from an investment standpoint—or even to conclude that the trustees really believed this. Investment considerations dictated a policy of waiting. If LTV's offer were accepted, the trustees would not want more Grumman shares; if it failed, the shares would be obtainable at prices far below what was paid. Mid-October 1981 was thus the worst possible time for the Plan to buy Grumman stock as an investment.[16] It is almost impossible to believe that the trustees did not realize this and that their motive for purchasing the additional shares was for any purpose other than blocking the LTV offer. Moreover,

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[16] The judge was not bound to accept the trustees' claim that purchases of considerable amounts of Grumman stock could not be made (and that their failure to purchase Grumman stock earlier although their belief in its attractiveness was claimed to go back to the summer of 1981 was thereby explained) on the ground that, with a daily volume of only 20,000 shares, substantial purchases would have greatly increased the price. No expert testified to that effect and no explanation was offered how the Plan had managed to accumulate 525,000 shares when, as Bierwirth stated, the market had been much thinner. Even if we assume that a carefully executed buying program would have somewhat boosted the price, there was no testimony that this would have been anything like the increase of ten points that had resulted from LTV's $45 offer.

even if we were to make the dubious assumption that a purchase for this purpose would have been permissible despite all the investment risks that it entailed, the trustees should at least have taken all reasonable steps to make sure the purchase was necessary. As indicated, Bierwirth was under the impression that the necessary 50.01% would not be tendered—an expectation not unnatural in view of the fact that Grumman's investment and pension plans already owned nearly a third of the shares—although he could not be sure. The record gives no explanation why, if additional shares were to be purchased, this could not have been done by Grumman, in some way that would not reduce the number of outstanding shares, with the bank credit Freese had negotiated in part for that very purpose, rather than by the Plan. There is also nothing to indicate that the trustees, or other Grumman officers or directors, had been willing to risk their own funds in buying additional Grumman shares in the interval before the Plan was free to act. While the trustees did wait over the week-end of October 10 and 11 to see whether the judge's decision on Grumman's application for a preliminary injunction would come down, there is nothing to indicate any effort to ascertain from the judge's chambers when this could be expected, although such an inquiry would have been entirely proper. To be sure, the trustees could not have foretold what the decision would have been but if they had known that it was expected to be filed on October 14, they could well have decided to postpone the expenditure of $44,000,000 of the Plan's money in buying Grumman shares even if denial of the injunction might have somewhat increased the price of the stock.

We do not join in all of the district judge's pejorative adjectives concerning the trustees. They were caught in a

difficult and unusual situation—apparently, so far as shown in the briefs, one that had not arisen before. We accept that they were honestly convinced that acquisition of Grumman by the debt-ridden LTV would mean a less bright future for Grumman and also that an LTV acquisition posed some special dangers to the participants of the Plan.[17] However, they should have realized that, since their judgment on this score could scarcely be unbiased, at the least they were bound to take every feasible precaution to see that they had carefully considered the other side, to free themselves, if indeed this was humanly possible, from any taint of the quick negative reaction characteristic of targets of hostile tender offers displayed at the September 24 board meeting, and particularly to consider the huge risks attendant on purchasing additional Grumman shares at a price substantially elevated by the tender offer. We need not decide whether even this would have sufficed; perhaps, after the events of late September resignation was the only proper course. It is enough that, for the reasons we have indicated, as well as others,[18] the district judge was warranted in concluding, on the materials before him, that the trustees had not measured up to the high standards imposed by § 404(a)(1)(A) and (B) of ERISA. How the

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[17] These dangers included the low level of pension benefits allegedly maintained by LTV; the fact that while LTV complied only with the minimum funding requirements of ERISA, Grumman contributed the impliedly higher amount of the maximum amount deductible under the IRC; the fact that LTV could merge or terminate the Plan; the near certainty that LTV would appoint new trustees for the Plan; and the danger that, even if it had the best of intentions towards the Grumman Plan, LTV's financial condition might preclude it from treating the Plan favorably.

[18] For example, the sudden desire for indemnity before the purchase was authorized.

situation will appear after a trial is a different matter which we cannot now decide.

Relief

Not seriously disputing that if interlocutory relief is to be granted, the preliminary injunction embodied in Part I of the court's order of January 13, 1982, was appropriate, the trustees challenge the propriety of Part II directing the appointment of an Investment Manager to act as receiver *pendente lite*. They insist that the Investment Manager is in fact a partial trustee; that, under § 7.01 of the Plan and §§ 2(c) and 10 of the Trust Agreement, new trustees can be appointed only by the Grumman board; and that the proposal for the appointment by the nonmanagement directors of three of their number as interim trustees filled whatever need there was to replace the existing trustees.

Although ERISA does not provide specifically for the appointment of a receiver in an action by the Secretary under § 1132(a)(5), such power is conferred by the provision authorizing him to seek "other appropriate equitable relief." See *Marshall* v. *Snyder*, 572 F.2d 894, 901 (2 Cir. 1978). The contention that in exercising this power a court is constrained by the provisions of a plan does not require comment. See Restatement of Trusts 2d § 199d, Comment d (1959). Still the appointment of a receiver is a harsh remedy, not to be imposed without a showing of necessity.

We fail to see why Part I of the order of January 11, 1982, does not sufficiently protect the situation during the interval before final judgment can be entered. This enjoins the trustee from "buying, selling or exercising any powers, rights or other duties on behalf of said Pension Plan regarding stock or other securities issued by the Grumman Corporation except upon the further Order of this Court,"

which, we assume, would have to be made on notice to the Secretary. We also read the order as preventing a decision not only to tender but a decision not to tender, except upon the further order of the court, if there should be a new tender offer; if the Secretary considers this to be doubtful and the trustees should refuse to make an appropriate stipulation, the court can clarify its order. The financial integrity of the trustees is not questioned, as is demonstrated by the court's willingness that they continue to act as such with respect to more than 90% of the Plan's assets. The only added benefits from the appointment of an Investment Manager are that he would be free to take initiatives, e.g., selling Grumman securities, that might not be taken by the trustees; that the presence of the Investment Manager might stimulate a new and advantageous tender offer; and that if such an offer should be made, which no one has suggested to be likely, the Manager would be in place. These benefits do not warrant the disruption and expense which the appointment would cost for what should be a short period. We therefore modify the order by striking Part II, without prejudice to the right of the Secretary to move for relief similar to that therein provided if there should be another tender offer prior to the entry of final judgment.

The order is modified as stated in the foregoing portion of this opinion and, as so modified, is affirmed. The Secretary may recover 80% of his costs.

Order of the Second Circuit, dated June 18, 1982

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of June, one thousand nine hundred and eighty-two.

RAYMOND J. DONOVAN, Secretary of the UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

JOHN C. BIERWIRTH, ROBERT G. FREESE and CARL A. PALADINO,

Defendants-Appellants,

and

JOSEPH W. ULLMAN, LILLIAN E. BALDISSARD, RITA V. HAFNER, ANTHONY PANCELLA, JR., KATHLEEN T. CHEW and BENJAMIN L. CREWS,

Intervenors-Appellants.

ORDER ON PETITION FOR REHEARING

Upon consideration of the petition for rehearing filed by defendants-appellants it is hereby ordered that the opinion of this court filed on May 10, 1982, be amended as follows:

Order of the Second Circuit, dated June 18, 1982

1. Slip opinion at p. 2600, line 23 should read: "and the record does not indicate that representatives of Dillon, Read attended the meeting for questioning[2a]". New note 2a will read:

> 2a. Although the record contains no reference to the fact, the trustees' Petition for Reconsideration informs us that three representatives of Dillon, Read attended the September 25 Grumman board meeting.

2. Slip opinion at p. 2603, line 16, after the words "buying Grumman shares", there should be inserted a new note 4a reading as follows:

> 4a. The trustees vigorously dispute this point in their Petition for Reconsideration. Although the issue is of marginal relevance to our decision, we note that at most the record indicates that the question of the Plan's purchasing additional Grumman stock was discussed in only the briefest and most casual manner by the trustees prior to their October 7 meeting. Freese answered "No" to the question "Was anything said [in discussions with Bierwirth] about what the response should be from the Pension Plan to the tender offer?". When asked whether he had "ever considered buying or selling Grumman shares between February and October 7?" Freese said, "I had thought about it myself as I moved through that time period. I hadn't talked to anybody else about it." (Freese deposition at 18-20).
>
> In response to the question "Prior to [the October 7] meeting, had you had any discussion with any of the other Trustees about purchasing additional Grumman stock for the Plan?", Bierwirth said only that "I reported to the other Trustees the considerable

number of beneficiaries of the Plan who had made a point of approaching me and asking me if the Pension Fund wouldn't consider an additional investment of Grumman." (380a).

When asked whether the plan had considered buying additional Grumman shares prior to the October 7 meeting, Paladino testified, "We did not have any formal discussions on it. I do recall myself thinking about contemplating it." (457a). Paladino testified that he did not "recall expressing" "that thinking to any of the other trustees". (457a). Later in his deposition, however, Paladino said that prior to the October 7 meeting, Bierwirth had suggested that it "might be beneficial to the plan to consider" the purchase of additional Grumman shares. (459a). He also said he recalled discussing "[j]ust briefly" with Freese the possibility of purchasing additional Grumman shares. (459a). William Parmentier, Grumman's Investment Manager, said he understood from informal discussions with the trustees prior to October 7 that they were contemplating the purchase of additional Grumman shares. (494a).

It is further ordered that, except as above granted, the petition for reconsideration by the panel is denied.

/s/ HENRY J. FRIENDLY
Circuit Judge

/s/ LAWRENCE W. PIERCE
Circuit Judge

/s/ CHARLES M. METZNER
District Judge

June , 1982

Order of the Second Circuit, dated June 18, 1982

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 18th day of June, one thousand nine hundred and eighty-two.

No. 82-6004

RAYMOND J. DONOVAN,
Secretary of the United States Department of Labor,

Plaintiff-Appellee,

v.

JOHN C. BIERWIRTH, ROBERT G. FREESE and CARL A. PALADINO,

Defendants-Appellants,

and

JOSEPH W. ULLMAN, LILLIAN E. BALDISSARD, RITA V. HAFNER, ANTHONY PANCELLA, JR., KATHLEEN T. CHEW and BENJAMIN L. CREWS,

Intervenors-Defendants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, John C. Bierwirth, Robert G. Freese and Carl A. Paladino, and the panel that

heard the appeal having denied said petition for rehearing in an order filed this day,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal, and no such judge having requested that a vote be taken thereon, rehearing in banc is DENIED.

A. Daniel Fusaro, Clerk

by:
/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED
JUN 18 1982

A. DANIEL FUSARO, CLERK

Memorandum of Decision and Order, dated December 3, 1981, filed December 3, 1981

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 CV 3408

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor,

Plaintiff,

—against—

JOHN C. BIERWIRTH, ROBERT G. FREESE and CARL A. PALADINO,

Defendants,

JOSEPH W. ULLMAN, LILLIAN E. BALDISSARD, RITA V. HAFNER, ANTHONY PANCELLA, JR., KATHLEEN T. CHEW and BENJAMIN L. CREWS,

Intervenor-Defendants.

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Mishler, District Judge

Plaintiff Raymond J. Donovan, the Secretary of Labor (the "Secretary"), brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, against the three trustees of the Grumman Corporation Pension Plan (the "Pension Plan") to, *inter alia*, enjoin acts and practices violative of Title I of ERISA and secure other appropriate equitable relief. The gravaman of plaintiff's complaint alleges that each of the individual trustees have breached their fiduciary duties by expending Pension Plan assets for the purchase of Grum-

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man Corporation stock in an effort to fend off the tender offer made for the Grumman Corporation ("Grumman") by The LTV Corporation ("LTV"). The details of those open market purchases made by the Pension Plan on October 12 and 13, 1981 have been recounted in a recent decision by this court, *The LTV Corporation* v. *Grumman Corporation*, —— F.Supp. —— (E.D.N.Y. October 16, 1981). For the purposes of presentation, we shall once again review the details of those purchases and examine the decision-making process which led to the purchase decision.

The material facts are either conceded or beyond dispute, and accordingly, this motion did not necessitate an evidentiary hearing. The court has thoroughly reviewed the exhibits and depositions submitted at the time of argument on October 30, 1981 and now makes the following findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

I. Facts

On September 24, 1981, The LTV Corporation publicly announced that it was making a tender offer for up to 70% of the Grumman Corporation's outstanding stock and securities convertible into stock conditioned upon acquiring at least 50.01% of Grumman stock on a fully diluted basis. On the day prior to the announcement, Grumman's Chief Executive Officer and Chairman of the Board of Directors, John C. Bierwirth, was informed of LTV's intentions while vacationing on the Mississippi River. He returned to Grumman headquarters at Bethpage, New York midday on the 24th. He did not confer with Grumman personnel concerning the LTV offer until his return. The Grumman Board

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of Directors convened September 25 and passed a resolution to fight the takeover. Thus, the commencement of Grumman's well orchestrated plan to defeat the LTV tender offer was set into motion.

The Pension Plan held 525,000 shares of Grumman stock prior to the October purchases. The market value of that investment immediately before the tender offer (at $25 per share) was approximately $13,125,000. LTV's offer to purchase Grumman stock for $45 per share presented the Pension Plan with the possibility of realizing a substantial gain on its Grumman investments.

Three days after the Board's decision to oppose the LTV takeover, Mr. Bierwirth, acting as Chairman of the Board, in a letter directed to "Fellow Grummanite(s)," observed the following:

> "We're very optimistic about our chances of defeating the takeover bid. About a third of all shares are held by Grumman's employee investment and pension plans. These plans are managed by Grummanites who will look long and hard at how well their fellow members would be served by selling off Grumman stock."

It was indeed the obligation of the Pension Plan trustees to take a long hard look at how the Plan would be served by tendering its Grumman stock.

Mr. Bierwirth spent approximately 90% of his working hours during the two-week period following his return to Long Island trying to understand the LTV offer and simultaneously denouncing it through public meetings with reporters, employees and retirees. His decision as a trustee of the Pension Plan to refuse the opportunity to tender was arrived at during a special meeting of the trustees on

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October 7. The meeting lasted somewhere between one and two hours while the discussion of whether to tender took approximately one-half hour. (Freese dep. at p. 30). Other than the trustees, John Mullan, in-house counsel for Grumman, was the only other individual present at the special meeting. John Mullan had not been formally retained by the Pension Plan as counsel. The trustees failed to consult with outside counsel, or any independent investment advisor. In part, they relied on the opinion of Dillon, Read & Co., an investment banking firm retained by Grumman to render an opinion solely on the adequacy of LTV's offering price.

The other Pension Plan trustees are Robert G. Freese and Carl A. Paladino. Approximately fifty percent of Freese's time between the announcement of the tender offer and the actual Pension Plan purchases was devoted toward raising bank credit for the purchase of Grumman common stock by Grumman. Paladino's only activity between September 23 and October 7 involved the preparation of financial material concerning Grumman Aerospace, a subsidiary of Grumman. (Paladino's dep. at pp. 13-16). He had neither formally nor informally, prior to the October 7 trustees' meeting, discussed the possibility of a Pension Plan purchase of Grumman stock. (Paladino's dep. at pp. 24-25).

The October 7 trustees' meeting commenced with a ten-minute presentation by Mr. Mullan about ERISA (Freese dep. at pp. 24-25), and culminated in a unanimous vote by the trustees not to tender the Grumman shares already owned by the Pension Plan. Further discussions led to a second decision wherein they voted to purchase up to an additional 1,275,000 shares of Grumman stock. The decision not to tender was announced in a press release on October

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8, the same day on which the trustees executed an amendment to the Plan's Trust Agreement providing for indemnification of the trustees by Grumman for liability arising out of any action absent willful misconduct or lack of good faith. The amendment agreement was dated October 7.

The October 7 decision to purchase Grumman stock was conditioned upon approval by the Securities and Exchange Commission of an exemption from Rule 10b-6, 17 C.F.R. § 240.10b-6, which prohibits persons interested in a "distribution" of stock from trading in that stock. The exemption was granted on October 9. Nevertheless, no purchases were made until October 12. The trustees hoped that this Court would enjoin the LTV tender offer over the following weekend thereby avoiding the Pension Plan purchases at the artificially high prices created by the tender offer, or alternatively, avoiding the purchases altogether. (See Bierwirth dep. at pp. 43-44). The injunction did not issue that weekend. The trustees convened briefly on October 12 and, without further discussion on the subject, decided to proceed with their purchases.

The Pension Plan purchased 958,000 shares through Dillon, Read & Co. on October 12. The price ranged from a low of $36 to a high of $39⅝ at an average price of $38.61 per share. On October 13, Dillon Read & Co. purchased an additional 200,000 shares on behalf of the Pension Plan at an average price of $36.62 per share.

The trustees offer essentially two theories of defense to the Secretary's claims. First, they believed that the Grumman stock represented a good investment for the Pension Plan. Secondly, they were concerned over the impact of an LTV takeover on the Pension Plan. The latter concern was twofold—that the Grumman Plan might be merged, termi-

nated or otherwise altered to the detriment of its beneficiaries and that LTV's financial health, upon which its pension plans ultimately depend for contribution, was unsound.

II. Discussion

In its instant motion for preliminary relief, the Secretary contends that each trustee breached his fiduciary obligation by, *inter alia*, (1) failing to act solely in the interest of the Pension Plan's participants and beneficiaries and for the exclusive purpose of providing benefits to its participants and beneficiaries and defraying reasonable expenses of plan administration, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A)[1] and (2) failing to act with the care, skill, prudence and diligence that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of a similar enterprise with similar objectives, in violation of Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B).[2]

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[1] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) provides as follows:

"Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan."

[2] ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) provides as follows:

"Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a

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The Pension Plan is an employee benefit plan established and maintained by Grumman. The plan is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3) and therefore subject to ERISA rules and regulations pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Secretary of Labor has standing to maintain this action under Section 502(a)(2) and (5) of ERISA, 29 U.S.C. § 1132(a)(2) and (5). Jurisdiction and venue in this court are proper under Section 502(e)(1) and (2) of ERISA, 29 U.S.C. § 1132(e)(1) and (2).

A. *Dual Loyalties*

Each of the trustees of the Pension Plan is also an officer of Grumman or a Grumman subsidiary. John C. Bierwirth is the Chief Executive Officer and Chairman of the Board of Directors of Grumman; Robert G. Freese is a Senior Vice President and a Director of Grumman; and Carl A. Paladino is a Senior Vice President of Grumman Aerospace Corporation, a subsidiary of Grumman. Each of the trustees is a fiduciary with respect to the Pension Plan within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

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plan solely in the interest of the participants and beneficiaries and—

with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

The Secretary also contends that the trustees have violated ERISA § 406(b)(1) and (2), 29 U.S.C. § 1106(b)(1) and (2). Even assuming the trustees have committed such violations, the scope of the preliminary relief would be unaffected. Accordingly, we decline the opportunity to pass on these claims.

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The alleged violations of ERISA arise from the difficult task presented to defendants during the time of the LTV tender offer of simultaneously serving two masters—Grumman and the Pension Plan. It is argued that the separate loyalties ("dual loyalties") created by their dual employment prevented the trustees from acting exclusively in the Pension Plan's interest. It is further argued that subsequent to LTV's tender offer it was *per se* unlawful for the plan's fiduciaries to act on its behalf because of their dual loyalties, without regard to whether their secondary loyalty (to Grumman) influenced their conduct. It is the latter contention which we now address.

Part 4 of Title I sets forth the fiduciary obligations which the Grumman trustees undertook to faithfully discharge. At the outset, we hold that ERISA contemplates the existence and approval, in certain circumstances, of fiduciaries acting on behalf of a pension plan even though they have dual loyalties. Section 408(c)(3) of ERISA, 29 U.S.C. § 1108(c)(3), implicitly authorizes an officer of the sponsor corporation to serve as a pension plan fiduciary by providing that Section 406 of ERISA, 29 U.S.C. § 1106 (specifying prohibited transactions), shall not be construed so as "to prohibit any fiduciary . . . from serving as a fiduciary in addition to being an officer, employee agent, or other representative of a party in interest." Further, ERISA section 407, 29 U.S.C. § 1107 specifically authorizes a plan to acquire stock of the sponsoring corporation. ERISA therefore necessarily contemplates that trustees, who may be officers of the sponsoring company, may act on behalf of the pension plan in making investment decisions concerning stock of the sponsor corporation in spite of a potential conflict of interests.

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A more detailed review of the statutory scheme of ERISA and its legislative history corroborates the foregoing conclusion. As previously stated, ERISA section 408(c)(3), 29 U.S.C. § 1108(c)(3), expressly contemplates fiduciaries with dual loyalties. The Conference Report on ERISA states that the statute "makes it *clear* that a party-in-interest may serve as a fiduciary in addition to being an officer . . . ." H.Rep. No. 93-1280, 93d Cong. 2d Sess. at 312, 3 U.S. Code Cong. & Admin. News [1974], p. 5092 (emphasis added). The Conference Report also contemplates a number of additional exceptions to the traditional rules governing fiduciary conduct. *See id.*

Having provided for an unorthodox departure from the common law rule against dual loyalties, Congress provided two statutory safeguards to protect plan participants and beneficiaries. First, the statute provides that "a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries. . . ." Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) (emphasis added). Therefore, although a trustee may have dual loyalties, when acting on behalf of the fund, his primary loyalty to the fund is the *only* loyalty which may affect his judgment.

Mindful of the difficulty presented to trustees so situated, Congress enacted Section 406 of ERISA as a further protection for plan participants and beneficiaries. That section prohibits a fiduciary from acting in *certain specified circumstances* in order to prevent him "from being put in a position where he has dual loyalties, and, therefore, . . . cannot act exclusively for the benefit of a plan's participants and beneficiaries." H.Rep. No. 93-1280, 93d Cong. 2d Sess. at 309, 3 U.S. Code & Admin. News [1974], p. 5089. The Conference Report's concern with the dangers inherent

in the case of a fiduciary with dual loyalties was expressed in connection with ERISA section 406(b)(2), 29 U.S.C. § 1106(b)(2), which prohibits fiduciaries from acting "in any transaction involving the plan on behalf of a party (or represent a party) whose interests are *adverse* to the interests of the plan or the interests of its participants or beneficiaries." (emphasis added). If we are to interpret ERISA as incorporating a *per se* prohibition against plan fiduciaries with dual loyalties acting on behalf of the plan, then the specific prohibition enacted to prevent a fiduciary from being placed in a position of dual loyalty is completely superfluous. *See id.* The negative implication, of course, is that Congress intended that fiduciaries with dual loyalties would be permitted to act in all other instances as long as they otherwise comply with ERISA section 404 and the balance of the restrictions found in ERISA section 406.

In construing ERISA, we are mindful of its remedial purposes and are therefore reluctant to depart from the inflexible, well established common law rule which precludes a fiduciary having dual loyalties from asserting the defense "that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of the secondary one." *Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 269, 61 S. Ct. 493, 497 (1941), *quoted in*, *NLRB* v. *Amax Coal Co.*, —— U.S. ——, 101 S. Ct. 2789, 2794 (1981). This well established rule naturally followed from the recognition in the courts of chancery of a trustee's "unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties." *NLRB* v. *Amax Coal Co.*, —— U.S. at ——, 101 S. Ct. at 2794.

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Nevertheless, even at common law, trustees are allowed to trade in securities or other property of an entity with which they are affiliated as long as authorization is provided by the terms of the trust. Restatement (Second) of Trusts § 170, comment n. ("[s]uch a purchase is proper . . . if expressly or impliedly authorized by the terms of the trust"). *Accord, e.g., Central Hanover Bank & Trust Co.* v. *Russell*, 290 N.Y. 593, 48 N.E.2d 704 (1943) (mem.); 2 A. W. Scott, *Law of Trusts* § 170.15 at 1340-41 (3d ed. 1967). We find that Section 407 of ERISA is Congress' authorization for a trustee to invest in sponsor corporation stock in spite of dual loyalties and conflicting interests *so long as* (1) he acts exclusively for the benefit of the plan beneficiaries and participants and otherwise complies with ERISA section 404, and (2) his actions are not violative of the proscriptions of ERISA section 406. Thus, the statutory scheme has abrogated the traditional common law rule. However, bearing in mind the purposes of ERISA, we further hold that a trustee having dual loyalties has "an *especial obligation* to act fairly on behalf of those concerned with the results of the action taken." *Withers* v. *Teachers' Retirement System of the City of New York*, 447 F.Supp. 1248, 1256 (S.D.N.Y. 1978), *aff'd mem.*, 595 F.2d 1210 (2d Cir. 1979) (applying common law principles of fiduciary duty) (emphasis added). The Grumman trustees had that very obligation when dealing with Grumman stock.

Our rejection of the Secretary's contention that the trustees' conduct was *per se* unlawful is not contrary to the Supreme Court's recent decision in *NLRB* v. *Amax Coal Co.* There, the Court held that the employer-selected trustees of a trust fund created under Section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), were not employer representatives

(or agents) "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, as amended by Section 101 of the LMRA. In so construing Section 8(b)(1)(B), the Court recognized that a trustee complies with his fiduciary obligations under ERISA *so long as* he refrains from engaging in specified prohibited transactions and *acts* "exclusively for the benefit of the plan's participants and beneficiaries." *See NLRB* v. *Amax Coal Co.*, U.S. at ——, 101 S. Ct. at 2796, *quoting* H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., 296, 309, 3 U.S. Code Cong. & Admin. News [1974], p. 5089. In acknowledging that a trustee might possess a dual and conflicting loyalty to the appointing sponsor of the trust plan, the Court simply stated that the trustee "must overcome" that loyalty. *Id.* at 2796. Finally, the discussion of dual loyalties in the context of an employer-financed trust fund is distinguished from the instant case because ERISA's statutory scheme, unlike the LMRA, clearly contemplates the approval of fiduciaries with dual loyalties.

Accordingly, we find that the trustees of the Pension Plan did not commit *per se* violations of ERISA either by their failure to abstain from the investment decision concerning Grumman stock or by the mere acquisition of Grumman stock. *See Curren* v. *Freitog*, 432 F.Supp. 668, 672 (S.D. Ill. 1977).

B. *Section 404(a)(1)(B) and the Prudent Man Rule*

1. *The Standard*

The Secretary further argues that even if the trustees were permitted to make investment decisions (the decision

to buy, sell, or hold) concerning the Grumman stock in the face of the LTV tender offer, they failed to act prudently as required by ERISA section 404(a)(1)(B). At the outset, we hold that this affirmative statutory duty—the duty to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"—subsumes the duty "to make an independent inquiry into the merits of a particular investment" decision. *See Fiduciary Standards and the Prudent Man Rule under ERISA*, 88 Harv.L.Rev. (Part 2) 960, 965 (1975).

A review of a fiduciary's independent investigation is one of the well-established yardsticks against which courts have customarily tested fiduciary conduct for prudence. *See, e.g., Withers* v. *Teachers' Retirement System*, 447 F.Supp. at 1254-55; *In re Talbot's Estate*, 141 Cal.App.2d 309, 296 P.2d 848 (1st Dist. 1956); *In re Clark's Will*, 257 N.Y. 132, 177 N.E. 397 (1931); *In re Kent's Estate*, 146 Misc. 155, 261 N.Y.S. 698 (Sur.Ct. 1932), *aff'd, In re Manufacturers Trust Co.*, 246 App.Div. 604, 284 N.Y.S. 976 (1935); 3 A.W.Scott, *Law of Trusts*, § 227.1 at 1809-11. This same test is properly applied in the instant case to test defendants' conduct. *See Morrissey* v. *Curran*, 567 F.2d 546, 548-49 & n.9 (2d Cir. 1977).

However, when a fiduciary has dual loyalties, his independent investigation into the basis for an investment decision which presents a potential conflict of interests must be both intensive and scrupulous and must be discharged with the greatest degree of care that could be expected under all the circumstances by reasonable beneficiaries and

participants of the plan. Were the rule less stringent, we could not be certain that the Cardozian time honored standard for fiduciary behavior—"the punctilio of an honor the most sensitive," *Meinhard* v. *Salmon*, 247 N.Y. 458, 164 N.E. 545 (1928)—would remain uncompromised. Moreover, this greater standard of care is a natural corollary to the trustee's heightened obligation to act fairly when acting with dual loyalties and is fully consistent with principles of equity and the policies underlying ERISA. *See Gilliam* v. *Edwards*, 492 F.Supp. 1255, 1261 (D.N.J. 1980) ("To fulfill its curative aim, ERISA should be given a liberal construction to safeguard the interests of the Fund participants and beneficiaries and to preserve the integrity of Fund assets"). A thorough review of the record compels us to find that each of the trustees were woefully remiss in this regard and that the Secretary has satisfied his burden of this motion for a preliminary injunction.

2. *The Standard Applied to the Instant Case*

Defendants contend that they "gave *appropriate consideration* to the factors relevant to ERISA's standard of prudence." (Defendants' Memorandum of Law, dated October 29, 1981) (emphasis added). They argue that their decision to purchase Grumman shares was based upon their *belief* (1) that the Grumman stock presented a unique and substantial opportunity for long-term appreciation and was consistent with the portfolio needs of the Pension Plan and (2) that their decision was designed to further the purposes of the plan and the interests of its beneficiaries.

However, as indicated above, a belief, even a good faith belief, held by the trustees does not insulate them from charges that they have acted imprudently. An examination

of the facts in *Withers* v. *Teachers' Retirement System of the City of New York*, 447 F.Supp. 1248 (S.D.N.Y. 1978), *aff'd mem.*, 595 F.2d 1210 (2d Cir. 1979), illustrates defendants' shortfallings in acting on behalf of the Pension Plan. Even though the Teachers' Retirement System (the "TRS") was not subject to ERISA, as we have previously noted, the same fiduciary principles apply since the trustees in *Withers*, as in the instant case, were subject to common law principles of fiduciary duty. *See Marshall* v. *Teamsters Local 282 Pension Trust Fund*, 458 F.Supp. 986, 990 (E.D. N.Y. 1978).

In *Withers*, the defendant trustees of the TRS were sued for allegedly having breached their fiduciary obligation to the TRS by authorizing the purchase of $860 million of New York City bonds during the City's financial crisis in November 1975. The bonds were highly speculative and unmarketable. Judge Conner found that the trustees had properly acted since they concluded, after a thorough independent investigation of the facts, that the long term viability of the TRS depended on the investment in New York City bonds. In finding that the trustees had fulfilled the obligation of independent investigation the court noted the following: (1) their conclusion that the bankruptcy of New York City was imminent was based on opinions from *highly reliable sources* and represented the *consensus* of a *broad spectrum* of opinion; (2) they participated in *frequent meetings* with City, State and Municipal Assistance Corporation ("MAC") officials during the summer and fall of 1975 concerning the deteriorating state of the City's finances; (3) in November 1975, there were *frequent meetings* among the trustees and the New York City Comptroller and Corporation Counsel to discuss the problems of the

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City's budget; (4) they acted on *all* the information available to them and "went to *great lengths* to satisfy themselves of the absence of any reasonable possibility" that investment in City bonds could be avoided, (emphasis added); (5) after concluding investment was necessary, they made every reasonable effort to "secure *maximum protection* for the beneficiaries of the TRS," (emphasis added); (6) the trustees made their decision without succumbing to the pressure exerted by both the Governor's office and by City Hall; and finally, (7) "their decision to invest in the City obligations was . . . forged from *intensive independent analysis* as well as consultation with experts." (emphasis added).

For the purposes of this motion, we shall assume that the interests of the Grumman Pension Plan were identical with those of Grumman. Our inquiry is directed solely to the manner in which the trustees exercised their judgment in committing Pension Plan assets amounting to some $36,988,380 (958,000 shares at an average price of $38.61 per share) on October 12 and $7,324,000 (200,000 shares at an average price of $36.62 per share) on October 13. These purchases represented a substantial commitment of Pension Plan assets which had been estimated to be in excess of $600,000,000 at its most recent valuation.

It is no defense to the Secretary's instant action that the trustees' decision to fight the LTV tender offer with Pension Plan assets might have been in the best interests of the Plan *if* their decision was arrived at without a thorough independent investigation of the basis for that decision. Luck or good fortune is no substitute for a trustee's duty of inquiry.

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We find that the trustees acted imprudently in purchasing Grumman stock on October 12 and 13. We further find that their conduct between the date of the LTV tender offer and mid-October evince an inability to make independent decisions on behalf of the Pension Plan solely in the interest of its participants and beneficiaries. We reach these conclusions because the trustees' decisions were made without sufficient inquiry into the facts upon which they based their decisions. We find that their conduct was solely motivated by their all consuming-desire to defeat the tender offer.

The deposition testimony of the three trustees provides overwhelming support for our conclusion. Rather than analyzing the offer, the trustees spent most of their time between September 24 and October 13 fighting the LTV tender offer. Even though it is clear that Bierwirth had, at most, a superficial understanding of the offer on September 25, he voted as a director of Grumman to reject the tender offer that same day. Our conclusion that he failed to understand the offer on the 25th is supported by his own deposition testimony. (Bierwirth dep. at p.9, spent three weeks "trying to understand what the offer was . . . .") While a reasonable inference is that Bierwirth had no interest in considering the LTV offer regardless of the potential for Grumman or the Pension Plan, Bierwirth would challenge this inference because of his "justifiable reliance" on the Dillon, Read & Co. opinion letter which was presented to the Board of Directors on September 25. We reject that contention out of hand and find that Bierwirth was committed to defeating the LTV takeover prior to the September 25 board meeting for reasons unrelated to the Dillon, Read & Co. opinion letter.

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Mr. Thayer, Chairman of the Board of Directors and Chief Executive Officer of The LTV Corporation, testified subject to cross-examination by Grumman in the related case *Grumman Corp.* v. *The LTV Corp.* Dkt. CV 81 3156, that Mr. Gavin, President of Grumman and speaking on behalf of Bierwirth, prior to the tender offer, rejected LTV's offer to discuss merger prospects. The Grumman rejection came on' one hour after LTV's inquiry. Bierwirth was aware of the merger proposal on September 23 and it appears that he personally rejected the offer for discussions on the subject. (See Bierwirth dep. at p.6). The rejection came notwithstanding the assurance provided by LTV that Bierwirth would have been retained as the Chief Executive Officer of a joint Grumman-Vought Aerospace operation. Nowhere in his deposition testimony did Bierwirth indicate that he opposed the takeover because of the potential antitrust violations and the related problems of future divestiture.

Mr. Bierwirth served as Grumman's chief public spokesman in opposing the LTV takeover. He spent virtually all of his time in activities related to the takeover which included attending meetings, lobbying in Washington, D.C., appearing on talk shows and discussing the crisis with reporters. His deposition testimony fails to reveal any effort to understand how the Pension Plan, as opposed to Grumman might have been advantaged by tendering its Grumman stock to LTV or how the fund might have been protected in the event of an LTV takeover. His inability to consider, or to request discussions, on the protection of Pension Plan benefits (and the survival of the Grumman plan as an independent plan) stemmed from his fear of a solution which would have seriously compromised his posi-

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tion as an advocate against the LTV takeover on behalf of Grumman. Bierwirth was totally committed to Grumman's resolution to quash the takeover bid.

In deciding as a Pension Plan trustee to reject the tender offer, Bierwirth "was quite interested in Carl Paladino's analysis of LTV . . .," presented at the October 7 trustees' meeting. (Bierwirth dep. p. 33). Paladino, however, was hardly a financial expert with respect to LTV. As previously mentioned, the only work performed by Paladino between September 23 and October 7 was the preparation of financial material on Grumman Aerospace. (Paladino dep. at 16). Paladino's only knowledge of LTV's financial position derived from his examination of the LTV annual report and the LTV 10-K. (Paladino dep. at 36). The trustees did not consult William Parmentier and his investment staff with regard to LTV's financial prospects. The third trustee, Mr. Freese, spent more than half of his time for the three weeks following September 25 arranging a bank line of credit for the future purchase of Grumman stock by Grumman.

Clearly, the trustees spent the abundance of their combined waking hours searching for LTV's Achille's heel and otherwise opposing the tender offer. It would be charitable to say that they "took a long and hard" look at how the takeover might damage the interests of the Pension Plan without endeavoring to make any examination of how its interests might have been advanced. Indeed, there was no real inquiry into the dangers presented to the Pension Plan in the event of a takeover. We find that their conclusions regarding the dangers presented by the takeover were based on conjecture, speculation and unfounded assumptions.

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As we have previously mentioned, the trustees never considered that they might strike a deal with LTV which could have protected the Pension Plan. The following inquiry was made of Bierwirth:

> "Q. was there any consideration as to the existing Pension benefits leaving aside the gratuitous increase, any consideration to tendering subject to attempting to obtain some protection for the basic pension benefits?

Bierwirth responded by stating one of his many unfounded assumptions:

> "A. I think you would have to say that we were of the opinion that you could not protect, so we did not discuss how we could give partial protection."

(Bierwirth dep. at p.29). LTV having once indicated a willingness to "talk merger" and having publicly pledged that it would not merge or terminate the Grumman Pension Plan (Bierwirth dep. at p.25; Paladino dep. at p.38), there was no basis for believing that the Texas conglomerate would have been unreceptive to discussions concerning security for Grumman Pension Plan participants and beneficiaries.

A host of other examples confirm that the trustees failed to act prudently. They failed to consult with outside, independent counsel.[3] In spite of the numerous and difficult

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[3] The only counsel available at the October 7 trustees' meeting was John Mullan, in-house counsel to Grumman. The propriety of consulting Grumman's counsel under such circumstances is subject to serious question.

questions presented by the LTV tender offer, we must reiterate that the October 7 meeting lasted less than two hours with only one-half hour devoted to the decision to reject the offer. The decision not to tender, and thereafter, to purchase, was arrived at without the consultation of an independent investment advisor. Yet, Pension assets were expended with the knowledge that if the trustees' objectives were realized, the Pension Plan would have to absorb substantial short-term losses.[4]

Defendants contend that independent investment advice was unnecessary since the Plan historically handled investment matters in-house. However, the in-house investment staff was not consulted. Viewing the October 12 and 13 purchases from solely an investment standpoint, i.e., ignoring the alleged impact on the Plan in the event of a takeover, taking notice of the availability in the marketplace of other investments, and considering that Grumman stock was selling at an all time high, the trustees should have also considered the long-term appreciation offered by other stocks with the advice of an investment counselor. It is axiomatic to state that any given investment is sensible only if it is superior to other investments available in the marketplace.

The trustees contend that they had guidance from reliable investment advisors. They cite the July 1981 Lehman Brothers Kuhn Loeb ("Lehman Brothers") research report which recommended the purchase of Grumman common to LTV. The report, however, did not render an opinion on

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[4] Following the affirmance by the Second Circuit Court of Appeals of our decision enjoining the LTV tender offer, *Grumman v. The LTV Corp.*, —— F.2d —— (2d Cir. 1981), the Pension Plan paper losses exceeded $10 million.

the market value of the Grumman stock and the recommendation was made at a time when Grumman stock was trading at $28 per share. The Lehman Brothers' report was hardly support for the proposition that Grumman stock was worth $45 per share to any investor. The tender offer price naturally included a premium for majority control over Grumman as was evidenced by LTV's condition of purchase (the acquisition of at least 50.01% of Grumman common on a fully-diluted basis). In contrast, the Pension Plan did not seek control. Without further analysis, it is evident that the Lehman Brothers' recommendation, prepared with LTV's unique financial position and business objectives in mind, was inadequate support for the trustees' decision to purchase Grumman stock at $45 per share.

Likewise, the trustees were not justified in relying on the Dillon, Read & Co. opinion prepared for the Grumman Board of Directors, dated September 25, 1981. The opinion letter drafted for the Board expressly noted that Dillon, Read & Co. had "provided investment banking services to Grumman in the past, including acting as a manager of an offering of its convertible subordinated debentures in April, 1980." Dillon, Read & Co. had an obvious interest in Grumman's continuing independence, and therefore, as horn-book law indicates, its opinion should have been subject to some level of scrutiny:

> "In reaching his conclusion [concerning an investment decision, a trustee] may take into consideration advice given to him by attorneys, bankers, brokers and others whom prudent men in the community regard as qualified to give advice. He is not justified, however, in re-

> lying wholly upon the advice of others, since it is his duty to exercise his own judgment in the light of the information and advice which he receives. In relying upon the advice of another, he should consider whether the person giving the advice is disinterested. Thus it has been held that in purchasing securities for the trust he is not justified in relying solely on the advice of a broker interested in the sale of the securities."

3 A.W. Scott, *Law of Trusts*, § 227.1 at 1809. The two-page opinion letter was reviewed by the Pension Plan trustees at the October 7 meeting.[5] The letter was unaccompanied by any underlying financial statistics and no representative from Dillon, Read & Co. was present for questioning. Nevertheless, the trustees relied on a report literally prepared overnight and based on the limited amount of information available at the time of the report's preparation. It was gross negligence, if not bad faith, to rely on such a report prepared some twelve days prior to the October 7 meeting *without any effort* to have Dillon, Read & Co. update their evaluation of LTV's offer.[6]

In connection with the foregoing, the balance of pertinent facts surrounding the trustees' decision compel us to conclude that they in fact proceeded in bad faith. Between the time of the tender offer and the October Pension Plan pur-

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[5] The two-page opinion letter authored by Dillon, Read & Co. upon which defendants so heavily relied was not submitted in opposition to the Secretary's motion until the court, *sua sponte*, made a request to defendants' counsel for its production on November 23, 1981.

[6] We also agree with the Secretary that no reliance could be placed upon the press release announcing the New York State Comptroller's decision not to tender the 60,000 Grumman shares held by the state pension plan.

Memorandum of Decision and Order, dated December 3, 1981, filed December 3, 1981

chases, they had one goal—to defeat the tender offer. Their policy was one of "conscious avoidance"; they intentionally avoided any inquiries which might have indicated that the success of LTV's tender offer could have been favorable to the Pension Plan.

The trustees had been educated on the complexities of "what goes on in the world of takeovers." (Bierwirth dep. at p.7). Earlier in 1981, Grumman had retained the firm of Skadden, Arps, Slate, Meagher & Flom ("Skadden, Arps") to render such advice. By retaining Skadden, Arps, the Grumman board manifested an understanding of the need to have expert legal advice on matters involving intricate federal statutes and administrative regulations. Each of the trustees were, and are, sophisticated businessmen. Yet, after having been shown pertinent sections of ERISA by Mr. Mullan at the October 7 meeting and after a brief oral presentation concerning the obligations of plan fiduciaries under ERISA, the trustees had no questions. (Paladino dep. at p.30; Freese dep. at pp.24-25). Their lack of concern or curiosity about the intricacies of ERISA and how it might affect the Pension Plan's ability to respond to the tender offer is in sharp contrast to the forward thinking decision of the Grumman directors, including Bierwirth and Freese, in retaining Skadden, Arps for general advice on corporate takeovers. The failure to retain counsel with an expertise in the area of ERISA during the four day period between the October 7 meeting and the massive buying campaign commencing on October 12 is strong evidence of their desire to *avoid* advice that might counsel against pension plan purchases. There was ample time to seek advice and it was no coincidence that the trustees failed to do so. Finally, their execution of the Trust Agreement

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Amendment dated October 7, 1981 which "clarified" the Pension Plan trustees' right to indemnification (Paladino dep. at p.67; exhibit 2), is a further indication of their awareness of ERISA's intricacies and the need for legal advice on matters related to the Pension Plan defense of the LTV takeover.

The trustees ignored other inquiries which should have been made. Plan fiduciaries have an affirmative duty to "defray[ ] reasonable expenses of administering the plan." § 404(a)(1)(A)(ii) of ERISA, 29 U.S.C. § 1104(a)(1)(A)(ii). Nevertheless, Paladino and Freese had no knowledge as to whether Dillon, Read & Co. was paid a brokerage commission for executing the October 12 and 13 purchase transactions. (Freese dep. at p.41; Paladino dep. at p.56). While Bierwirth knew that Dillon, Read & Co. was paid seven and a half cents a share, he had no idea whether that commission ($86,850 in total) was standard. (Bierwirth dep. at pp.56-57).

Even assuming, as the trustees contend, that they were entitled to consider the impact on the Pension Plan of a successful LTV tender offer, we decline to detail their lack of prudence in this regard, except as is evident from the following: (1) none of the trustees knew how many pension plans were sponsored by LTV; (2) no effort was made to learn anything about LTV's pension plans; further, Bierwirth and Freese never considered examining the Internal Revenue Service Form 5500 annual report which all pension plans file even though they were aware that such reports are filed; (3) though much was made of the $225 million unfunded pension liability assumed in connection with the LTV acquisition of the Lykes Corporation, the trustees neither knew nor investigated why, when or

how it came about; Mr. Freese suspected that the unfunded pension liability was not attributable to LTV mismanagement, and finally; (4) though they claim they were fearful that LTV would merge or terminate the Pension Plan (a) Bierwirth and Freese were aware of public pledges from LTV to the contrary but took no steps to secure such assurances and (b) Paladino admitted no basis for believing that LTV would terminate the Pension Plan.

The conduct of the trustees reflects a silent agreement among them (1) to "see, hear, and speak" nothing positive about the LTV tender offer and avoid any inquiries which might have uncovered facts to the contrary and (2) to isolate themselves from legal advise which might have precluded the Pension Plan from participating in the well orchestrated plan to kill the LTV takeover. The unavoidable conclusion is that the trustees failed to discharge their duty of prudence either diligently or in good faith.

III. Preliminary Relief

The statutory provisions of ERISA authorize the court to award the relief it deems appropriate upon finding that a fiduciary has breached responsibilities, obligations or duties arising under the statute. In pertinent part, ERISA section 409, 29 U.S.C. § 1109(a) provides:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which may have been made through use of assets of

Memorandum of Decision and Order, dated December 3, 1981, filed December 3, 1981

the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . ."

We find that further proceedings are required in order to fashion the relief which will most suitably promote the interests of the Pension Plan, its participants and its beneficiaries.

The relief requested by the Secretary is the appointment of a receiver *pendente lite* who can independently assess the desirability of disposing or holding the Grumman stock held by the Pension Plan. The Secretary does not object to the continuing service by defendant trustees, *pendente lite,* in all matters except as to the Grumman stock. The identical request for preliminary relief has been made in a related case, *Lawrence* v. *Grumman Corporation Pension Plan,* Dkt. CV 81 3530, not yet consolidated with this action.

Plaintiff has shown a likelihood of success on his claim that each of the trustees has acted imprudently with respect to their recent investment decisions concerning Grumman stock. They have manifested an inability to separate their corporate loyalty and their loyalty to the Pension Plan. The manner in which they exercised their judgment with respect to the Grumman stock was so egregiously imprudent that we must infer a likelihood of further violations. The very decision to hold Grumman stock makes Grumman a less likely candidate as a takeover target. The conduct of the Pension Plan trustees has demonstrated the difficulty that they have in examining objectively an investment decision which might affect the independence of Grumman.

Memorandum of Decision and Order, dated December 3, 1981, filed December 3, 1981

While it is clear that interim relief pursuant to ERISA section 409 is in order, we are reluctant to fashion such relief without comment from all interested parties. We would consider a number of factors for the purposes of selecting an interim remedy including: "(1) the purposes of the trust; (2) the relative pecuniary advantages to the trust estate of the various remedies; (3) the nature of the interest of each beneficiary; (4) the practical availability of the various remedies; and (5) the extent of the deviation from the terms of the trust required by the adoption of each of the remedies." *Eaves* v. *Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978), *quoting, Restatement (Second) of Trusts*, § 214 Comment to Subsection (2, b).

Accordingly, the parties, including the interested parties in the action entitled *Lawrence* v. *Grumman Corporation Pension Plan*, Dkt. CV 81 3530, as well as any participants and beneficiaries who so desire, are directed to submit recommendations and arguments for the appropriate type of relief on or before December 18, 1981. Until such time as this court fashions further preliminary relief following the aforementioned submission date, John C. Bierwirth, Robert G. Freese and Carl A. Paladino, in their capacity as trustees of the Grumman Corporation Pension Plan, are hereby restrained from buying, selling or exercising any powers, rights or other duties on behalf of said Plan respecting stock or other securities issued by the Grumman Corporation except upon the written consent of the Secretary of Labor, and it is

So Ordered.

Jacob Mishler
U.S.D.J.

Order dated January 11, 1982 Granting Preliminary Injunction, Appointing Receiver *Pendente Lite*, and Granting a Conditional Stay

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 81 CV 3408

RAYMOND J. DONOVAN, Secretary of the United States Department of Labor,

Plaintiff,

v.

JOHN C. BIERWIRTH, ROBERT G. FREESE, and CARL A. PALADINO,

Defendants,

JOSEPH W. ULLMAN, *et al.*,

Intervenor-Defendants.

In accordance with the Memorandum of Decision and Order filed by the Court on December 3, 1981 and after consideration of the further submissions of the parties and interested persons, it is hereby ORDERED:

I. PRELIMINARY INJUNCTION

The defendants, John C. Bierwirth, Robert G. Freese and Carl A. Paladino, trustees of the Grumman Corporation Pension Plan (the "Pension Plan"), are hereby preliminarily enjoined from buying, selling or exercising any powers, rights or other duties on behalf of said Pension Plan regarding stock or other securities issued by the

Order dated January 11, 1982 Granting Preliminary Injunction Appointing Receiver Pendente Lite, and Granting a Conditional Stay

Grumman Corporation except upon the further Order of this Court.

II. Appointment of Investment Manager to Act as Receiver Pendente Lite

A. *Duties and Powers*

A receiver shall be appointed to serve until further order of this Court as an Investment Manager (the "Investment Manager") for all Grumman stock or securities presently owned by the Pension Plan. Immediately upon his appointment, the Investment Manager shall take sole and exclusive control of such stock and securities and shall thereafter exercise on behalf of the Pension Plan all powers, rights, and duties respecting such stock or securities including the power to sell, tender for sale, or otherwise dispose of all or part of such stock or securities. The proceeds of any such disposition shall be promptly transmitted by the Investment Manager to the control of the defendant trustees and, once such a transfer has been accomplished, the Investment Manager shall have no powers, rights, or duties with respect to any such proceeds or assets resulting from such a disposition. In the event of disposition of a portion of the Grumman stock or securities held by the Pension Plan, the Investment Manager shall retain responsibility for any such stock or securities which has not been disposed of.

Immediately after his appointment, the Investment Manager shall file with the Court, with copies to the parties, a statement affirming that he is qualified to serve as an Investment Manager within the meaning of section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §2(38) including a written acknowledg-

ment that he is acting as a fiduciary with respect to the Pension Plan. The Investment Manager shall have no authority to delegate his fiduciary responsibility with respect to the Pension Plan assets confided to his management. He shall be entitled to retain or employ such persons or firms as are necessary or useful in the performance of his duties including, but not limited to, independent legal counsel.

The Investment Manager shall have no duty to consult with anyone, including the parties to this litigation or the Grumman Corporation or its officers and directors, prior to taking any action with respect to any of the assets confided to his management. The Investment Manager shall have custody of all books, records, and documents relating to Grumman stock or securities owned by the Pension Plan which are now in the custody or control of the defendants. The defendants shall cooperate with the Investment Manager in all matters relating to his management of Pension Plan assets. The Investment Manager shall timely furnish to the defendants all information necessary for their compliance with ERISA and other applicable laws. The Investment Manager shall promptly obtain a bond in the amount and to the extent, if any, required by section 412 of ERISA, 29 U.S.C. §1112.

B. *Appointment and Compensation*

1. *Minimum Requirements*

The Investment Manager shall be a person or entity who:

a) is (i) registered as an investment advisor under the Investment Advisers Act of 1940; (ii) is a bank,

as defined in that Act; or (iii) an insurance company qualified to manage, acquire, and dispose of employee benefit plan assets under the laws of more than one state;

b) has previously served or is serving as an investment advisor or investment manager to employee benedt plans with assets exceeding $100 million subject to his control or advice;

c) has substantial experience managing, or providing investment advice with respect to, stock or other securities;

d) whose fee shall be no more than is commercially reasonable, and shall not exceed the fees charged by the manager for comparable services to comparable clients; and

e) has no substantial existing or anticipated relationships with the Grumman Corporation, its subsidiaries or their officers and directors.

2. *Method of Selection*

The Court intends to select the Investment Manager based on the criteria set forth in section II B1, *supra*; in the event that specific persons or firms appear equally suitable to serve as Investment Manager, the Court will select the person or firm whose service appears likely to involve the lowest expense. The Investment Manager will be selected from names submitted, in accordance with the Court's previous direction, by the interested parties to this action and from any other persons or firms who make writ-

Order dated January 11, 1982 Granting Preliminary Injunction Appointing Receiver Pendente Lite, and Granting a Conditional Stay

ten submissions to the Court, with copies to the parties, expressing their interest in serving as the Investment Manager and describing their qualifications, including their proposed fees, in light of the criteria set forth in section II B1, *supra*. In order to encourage such written submissions from firms which appear potentially acceptable as Investment Manager, plaintiff is directed to distribute a copy of this Order and of the Memorandum of Decision and Order to no fewer than ten large professional investment advisory or management firms headquartered in the New York City area along with an explanatory letter advising them that any written submissions must be made to the Court within 30 days from entry of this Order.

III. STAY

The provisions of section II of this order shall be stayed until further order of this Court on the following condition:

that defendants promptly request and diligently pursue an expedited appeal from this Order to the United States Court of Appeals for the Second Circuit, and

it is

SO ORDERED.

/s/ JACOB MISHLER
U.S.D.J.

Issued at 4:00 p.m.
January 11, 1982
Uniondale, New York

Judgment of the Second Circuit, dated May 10, 1982

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of May, one thousand nine hundred and eighty-two.

Present:

HON. HENRY J. FRIENDLY
HON. LAWRENCE W. PIERCE, Circuit Judge
HON. CHARLES M. METZNER, District Judge

82-6004

RAYMOND J. DONOVAN,
Secretary of the United States Department of Labor,

Plaintiff-Appellee,

v.

JOHN C. BIERWIRTH, ROBERT G. FREESE and CARL A. PALADINO,

Defendants-Appellants,

and

JOSEPH W. ULLMAN, LILLIAN E. BALDISSARD, RITA V. HAFNER, ANTHONY PANCELLA, JR., KATHLEEN T. CREW and BENJAMIN L. CREWS,

Intervenors-Defendants.

Judgment of the Second Circuit, dated May 10, 1982

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed as modified with costs in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by

/s/ Edward J. Guardaro

Edward J. Guardaro

Deputy Clerk

United States Court of Appeals
Second Circuit

Filed
May 10 1982

A. Daniel Fusaro, Clerk

APPENDIX OF STATUTORY PROVISIONS

Appendix of Statutory Provisions

Section 404 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104 provides in part:

Fiduciary duties

"(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter. . . ."

Section 407 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1107 provides in part:

Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans.

Percentage limitation

"(a) Except as otherwise provided in this section and section 1114 of this title:

*** * ***

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan."

Office - Supreme Court
FILED
NOV 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-422

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN C. BIERWIRTH, ROBERT G. FREESE, AND CARL A. PALADINO, PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, after ruling that the trustees of a pension plan had violated the fiduciary duties imposed on them by Section 404 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1104, the court of appeals correctly affirmed the issuance of a preliminary injunction tailored to prevent further violations of the statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-422

JOHN C. BIERWIRTH, ROBERT G. FREESE, AND CARL A. PALADINO, PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-31A), as modified by a subsequent order (Pet. App. 32A-34A), is reported at 680 F.2d 263. The opinion of the district court (Pet. App. 37A-65A) is reported at 538 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1982 (Pet. App. 71A-72A). A petition for rehearing was denied on June 18, 1982 (Pet. App. 35A-36A). The petition for a writ of certiorari was filed on September 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Grumman Corporation maintains a pension plan (the "Plan") for the benefit of its employees and retirees that is subject to the provisions of the Employee Retirement

Income Security Act of 1974 ("ERISA"), 29 U.S.C. (& Supp. IV) 1001 *et seq.* During September and October 1981, petitioners John C. Bierwirth, Robert G. Freese, and Carl A. Paladino served both as trustees of the Plan and as senior executives of Grumman.[1]

On September 23, 1981, LTV Corporation announced its intention to make a $45 per share cash tender offer for 70% of Grumman's common stock and common stock equivalent instruments (Pet. App. 6A). At that time, the stock was trading between $24 and $27 per share. The offer was conditioned upon tender of a minimum of 50.01% of the common stock (*id.* at 7A).

Grumman's board of directors, which included petitioners Bierwirth and Freese, met on September 25, 1981 to consider the offer (Pet App. 7A). Relying in part on a two-page letter from Dillon, Read & Company, Grumman's investment banker, stating "in a conclusory fashion" that the tender offer was inadequate, the board voted unanimously to recommend to stockholders that they reject the offer (*id.* at 7A-8A). A few days later, Grumman filed suit in federal court to enjoin the offer, alleging violations of the antitrust and securities laws (*id.* at 4A, 8A).

Bierwirth and Freese respectively spent about 90% and 50% of their time during the weeks following the tender offer working to defeat it (Pet. App. 9A). Paladino spent all of his time preparing financial material relating to Grumman Aerospace (*id.* at 41A). On October 7, 1981, Bierwirth, Freese and Paladino, acting in their capacity as trustees,

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[1]Petitioner Bierwirth was Chief Executive Officer of Grumman. Petitioner Freese was a Vice President and the Corporation's Chief Financial Officer. Petitioner Paladino was Chief Financial Officer of Grumman's principal subsidiary, Grumman Aerospace Corporation. Bierwirth and Freese were also members of the Grumman board of directors.

met to decide whether the Plan should tender its 525,000 shares of Grumman stock (*id.* at 10A-11A). At this meeting, the trustees heard a 10-minute presentation on the requirements of ERISA from counsel employed by Grumman and discussed LTV, the Dillon, Read opinion letter, and financial projections for Grumman (*id.* at 11A). After a 30-minute discussion, the trustees allegedly concluded that tendering the Plan's shares would be detrimental to the interests of the Plan's participants and beneficiaries (*id.* at 11A-12A; Pet. 6). The trustees then discussed whether the Plan should invest in additional shares of Grumman stock (Pet. App. 12A). Although they felt that the tender offer was likely to fail and that Grumman stock would rapidly fall in price after such an event, the trustees concluded that it would nonetheless be prudent for the Plan to purchase Grumman shares up to the maximum (10% of the Plan's assets) permitted by Section 407(a)(2) of ERISA, 29 U.S.C. 1107(a)(2) (Pet. App. 13A). On the day following the meeting, Grumman and the trustees amended the trust agreement to provide that Grumman would indemnify the trustees for any liability or expense arising out of any action or inaction by the trustees absent willful misconduct or lack of good faith (*id.* at 13A, 42A).

On October 9, 1981, the Securities and Exchange Commission granted the exemption from Rule 10b-6, 17 C.F.R. 240.10b-6, thought necessary to permit the purchase, and on October 12, the trustees met briefly and authorized purchase of 1,275,000 shares of Grumman stock (Pet. App. 13A). During that day and the next, the Plan purchased 1,158,000 shares at an average price of approximately $38 per share (*id.* at 14A). The day after the purchases were completed, the district court granted Grumman's motion for a preliminary injunction against the tender offer. *Grumman Corp.* v. *LTV Corp.*, 527 F. Supp. 86 (E.D.N.Y.),

aff'd, 665 F.2d 10 (2d Cir. 1981). On October 15, the price of the stock fell to a range of $28.25-$29.50 per share (Pet. App. 14A).

2. On October 19, 1981, the Secretary of Labor brought suit under ERISA in the United States District Court for the Eastern District of New York, alleging in pertinent part that the trustees' actions in declining to tender the Plan's shares and in causing the Plan to purchase additional shares constituted a violation of the trustees' duties to act prudently and solely in the interest of plan participants and beneficiaries under Section 404(a) of ERISA, 29 U.S.C. 1104(a).[2] The complaint sought equitable relief, including restoration of losses suffered and appointment of an investment manager to handle transactions involving Grumman stock. The Secretary also moved for a preliminary injunction.

After hearing argument and considering exhibits and deposition testimony submitted by the parties, the district court concluded that "[p]laintiff has shown a likelihood of success on his claim that each of the trustees has acted

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[2]Section 404(a)(1) of ERISA, 29 U.S.C. (& Supp. IV) 1104(a)(1), provides, in relevant part, that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

imprudently with respect to their recent investment decisions concerning Grumman stock," and that injunctive relief was necessary to prevent "further violations" (Pet. App. 64A). Accordingly, the court granted the Secretary's motion for a preliminary injunction and issued an order forbidding petitioners from causing the Plan to deal in Grumman stock without a court order (*id.* at 66A-67A). The court also granted (but stayed pending appeal) the Secretary's request that an investment manager be appointed pendente lite to make decisions concerning the Grumman stock (*id.* at 67A-70A).

3. The court of appeals affirmed the grant of a preliminary injunction (Pet. App. 1A-31A).[3] The court concluded that the record before the district court justified its conclusion that the trustees had violated Section 404(a) (Pet. App. 29A). It held that Section 404(a) imposed a "high standard of duty" on the trustees and required that their decisions be made "with an eye single to the interests of the participants and beneficiaries" (Pet. App. 19A, 21A). In reviewing the largely undisputed facts before it, the court held that the trustees' conduct failed to meet the standards of Section 404 in several respects.

First, the trustees failed to seek independent legal advice concerning the tender offer when "they should have realized that * * * their judgment on this score could scarcely be unbiased" (Pet. App. 29A, 21A-22A). The counsel on whom they did rely "was under disabilities similar to those of the trustees themselves," and could hardly have been

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[3]The court of appeals considered the preliminary injunction against dealing in Grumman stock absent court approval sufficient to "protect the situation during the interval before final judgment can be entered" (Pet. App. 30A). The court therefore modified the district court's order by deleting the requirement for appointment of an investment manager pendente lite (*id.* at 31A).

expected to offer objective advice (*id.* at 22A). Second, the court observed that the trustees had failed to ascertain thoroughly the actual dangers to the Plan from the merger and had failed to explore either the "elaborate safeguards" to protect the Plan that ERISA provided or the possibility of negotiating additional ones (*id.* at 22A-26A & nn. 13, 14). Finally, the court held that even if the trustees could permissibly have purchased shares for the Plan in order to block the tender offer notwithstanding all the attendant investment risks, they should have "taken all reasonable steps" to determine whether such a purchase by the Plan was necessary to defeat the takeover attempt and justifiable as an investment (*id.* at 28A; see also *id.* at 26A-27A). The court pointed out that the trustees had caused the Plan to buy Grumman stock at the "worst possible time" and that "[i]nvestment considerations dictated a policy of waiting" because the price of the shares was bound to decline regardless of the outcome of the tender offer (*id.* at 26A-27A).

ARGUMENT

1. The decision of the court of appeals did not finally dispose of this case, but merely affirmed the grant of interlocutory relief. See Pet. App. 29A-30A. Should petitioners prevail after a trial on the merits, they will have no need for relief from this Court. Should a permanent injunction be granted by the district court and approved on appeal, petitioners may renew their contentions here. There is, accordingly, no reason for this Court to depart from its usual practice of declining to review nonfinal orders of the courts of appeals. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). The normal practice is particularly applicable here in light of the court of appeals'

willingness to rely on the relatively mild remedy of a preliminary injunction prohibiting petitioners from buying, selling, or otherwise dealing with the Plan's Grumman stock without the district court's authorization, and its consequent vacation of the more onerous requirement of the district court for the appointment of an investment manager pendente lite.

2. Review is, in any event, unwarranted because the court of appeals correctly affirmed the district court's issuance of a preliminary injunction. The standard for determining whether preliminary relief should be granted in a suit brought by the government to enforce the laws of the United States is whether the government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor.[4] See *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061, 1067, 1073-1074 (S.D.N.Y. 1969), aff'd mem. sub nom. *Bartlett* v. *United States*, 401 U.S. 986 (1971); *United States* v. *Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980); *SEC* v. *Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). Here, the district court ruled that the Secretary had shown a likelihood of success on his claim that petitioners had violated Section 404(a) and that an injunction was necessary to prevent further violations (Pet. App. 64A). The court of appeals, which need only decide whether the district court abused its discretion, *University of Texas* v. *Camenisch*, 451 U.S. 390, 393 (1981); *Synanon Foundation, Inc.* v. *California*, 444 U.S. 1307 (1979) (Rehnquist, Circuit Justice), agreed with the district court's determinations (Pet.

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[4]The Secretary is authorized by statute to bring a civil action for injunctive relief generally to prevent violation of ERISA, see 29 U.S.C. 1132(a)(5), and specifically to enforce fiduciary requirements, see 29 U.S.C. 1132(a)(2); 29 U.S.C. 1109(a).

App. 29A, 30A).[5] As we show below, petitioners' challenges to the court of appeals' decision are without merit, and no further review of the grant of preliminary relief is warranted.

a. The court of appeals properly rejected petitioners' suggestion (Pet. 13-17) that the "prudence" and "exclusive purpose" requirements of Section 404(a) do not apply to them. Their argument rests on Section 407(a)(2), 29 U.S.C. 1107(a)(2), which prohibits a plan from acquiring or holding employer securities in excess of 10% of its assets, on Section 408(c)(3), 29 U.S.C. 1108(c)(3), which permits corporate officers and employees to serve as fiduciaries, and on legislative history of an early version of ERISA that spoke of the "symbiotic relationship existing between the employer and the plan covering his employees." S. Rep. No. 93-127, 93d Cong., 1st Sess. 33 (1973). These factors, petitioners reason, indicate a confidence in employer-trustees that makes the fiduciary restrictions of ERISA unnecessary, so long as a plan's purchases do not exceed 10% of plan assets.

But, as this Court recognized in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 333 n.16 (1981), Section 408(c)(3) "in no way limits the duty of [a trustee who is also an employee of a sponsoring union or employer] to follow the law's fiduciary standards while he is performing his responsibilities as trustee." And, as the Conference Report on Section 407 makes plain, Congress did not create a 10% "safe harbor"; rather, the acquisition and holding of sponsoring employer securities "must also meet the rules of prudence, diversification, etc. * * * [and] must be for the exclusive benefit

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[5]Recognizing that the grant of a preliminary injunction must normally be upheld absent an abuse of discretion, the court of appeals nevertheless undertook a full review in this case because the district court's decision hinged on its legal conclusion that ERISA imposes a high standard of care on the trustees (Pet. App. 14A-16A). The court of appeals' thorough review could only have benefitted petitioners and thus furnishes them no cause for complaint.

of participants and beneficiaries." H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 320 (1974).[6] Thus, the "prudence" and "exclusive purpose" rules of Section 404(a) are fully applicable to this case. See *Eaves* v. *Penn*, 587 F.2d 453, 459-460 (10th Cir. 1978) (ERISA's prudence requirement applies to acquisition of sponsor securities by an employee stock ownership plan which, under Section 407, may invest all of its assets in sponsor securities).

b. The court of appeals was also correct in concluding that the record before the district court demonstrated that petitioners had failed to satisfy the fiduciary duties of Section 404 when they were deciding whether to tender the Plan's Grumman stock to LTV and whether to purchase additional Grumman shares as an investment for the Plan. As the court recognized, "[t]he fiduciary obligations of the trustees to the participants and beneficiaries of the plan are those of trustees of an express trust—the highest known to the law" (Pet. App. 20A n.8). Among other things, those obligations include the duty to evaluate thoroughly the risks of particular investments in light of available alternatives, *Marshall* v. *Glass/Metal Association & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Hawaii 1980), and the duty "to make independent inquiry into the merits of particular investments," *Withers* v. *Teachers' Retirement System*, 447 F. Supp. 1248, 1254-1255 (S.D.N.Y. 1978), aff'd mem., 595 F.2d 1210 (2d Cir. 1979).

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[6]The legislative history petitioners cite (Pet. 14 & n.13) is not to the contrary. The "symbiotic relationship" described in the Senate Report is qualified by a statement in the previous sentence. The 10% exemption was viewed by Congress as merely "creat[ing] a limited exception to the listed proscription against self-dealing." S. Rep. No. 93-127, *supra*, at 33. Nothing in the full passage remotely suggests that Congress also intended to create an exemption from ERISA's general fiduciary provisions.

The court of appeals noted, however, that "[t]he record contains specific instances of the trustees' failure to observe the high standard of duty placed upon them" (Pet. App. 21A).

Thus, notwithstanding the potential conflict between their duties as corporate officers and their duties as Plan trustees, petitioners did not solicit legal advice from independent counsel, who would have been without "disabilities similar to those of [petitioners] themselves" (Pet. App. 22A). Nor did they thoroughly ascertain the facts with respect to LTV's pension funds and the possible protections for the Grumman Plan available from LTV and provided under ERISA (*id.* at 22A-25A). Finally, and even more telling, the court of appeals held, petitioners did not adequately determine whether the purchase of additional Grumman shares was a sound investment or even necessary to block the takeover attempt (*id.* at 26A-28A).[7] These facts, found by the district court and affirmed by the court of appeals, do not warrant further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[8]

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[7]The court of appeals concluded that petitioners' failure to take even these steps justified the district court's determination that they had not satisfied Section 404's requirements (Pet. App. 29A). The court, therefore, determined that it need not consider whether petitioners should have been required to take additional actions to meet their fiduciary duties (*ibid.*). We, like the court of appeals, find it unnecessary to address any additional requirements that Section 404 might impose.

[8]Petitioners incorrectly claim (Pet. 12, 17-19) that, in reaching its decision, the court of appeals held that the trustees could not consider the impact of a merger with LTV on the Grumman Pension Plan, its participants, and its beneficiaries. The court did *not* hold that petitioners were precluded from considering these factors when making investments. Instead, the court was willing to assume that they could take the merger's impact into account and could purchase stock to help defeat the tender offer (Pet. App. 28A), but held that petitioners' failure to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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meet the "high standards" of Section 404 when taking those actions violated ERISA.

Similarly, the court did not, as petitioners imply (Pet. 16 n.15), ignore their consideration of the potential value of Grumman stock as a long term investment. The court simply found it "almost impossible to believe" that petitioners had made the purchase because of its attractiveness inasmuch as "[m]id-October 1981 was * * * the worst possible time for the Plan to buy Grumman stock as an investment" (Pet. App. 27A).